INDIAN CLAIMS COMMISSION PROCEEDINGS

(2003) 16 ICCP

Special Issue on Interim Rulings

Rulings on Government of Canada Objections

Athabasca Denesuline Inquiry
Lac La Ronge Indian Band Inquiries
Mikisew Cree First Nation Inquiry
Walpole Island First Nation Inquiry
Sandy Bay First Nation Inquiry
Alexis First Nation Inquiry
James Smith Cree Nation Inquiries
Kluane First Nation Inquiry
Peepeekisis First Nation Inquiry

Rulings on First Nation Objections

Canupawakpa Dakota First Nation Inquiry
James Smith Cree Nation Inquiry

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Indian Claims Commission Proceedings

Special Issue on Interim Rulings

A Publication of

The Indian Claims Commission

(2003) 16 ICCP

Chief Commissioner

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FROM THE CHIEF COMMISSIONER

On behalf of the Commissioners of the Indian Claims Commission, I am pleased to present this 16th volume of the *Indian Claims Commission Proceedings*. We devote this volume to interim rulings on challenges to the Commission's mandate. Over the past 11 years, the Commission has been presented with 11 mandate challenges, nine of which were on behalf of the Government of Canada and two on behalf of First Nations.

Of the 11 interim rulings into ongoing inquiries, the Commission has issued its final report in the case of three of the inquiries; seven are continuing. In the claims of the Lac La Ronge Indian Band, the First Nation chose not to continue with its request for an inquiry, and consequently the Commission has closed the file.

Throughout these rulings, the Commission has considered the remedial nature of its mandate and reviewed the unique circumstances in each case. One common element and perhaps the primary consideration has been to apply the principle of fairness of the process to the parties.

Since issuing these rulings, the Commission has been asked several times for copies; we hope that readers will find this compilation a useful reference.

Phil Fontaine
Chief Commissioner

ABBREVIATIONS

AC	Appeal Cases
BCSC	British Columbia Supreme Court
BCR	Band Council Resolution
CA	Court of Appeal
CNLR	Canadian Native Law Reporter
CPR	Canadian Patent Reporter
DIAND	Department of Indian Affairs and Northern Development
DLR	Dominion Law Reports
FC	Canada Federal Court Reports
FCA	Federal Court Appeal Division
FCTD	Federal Court Trial Division
FTR	Federal Trial Reports
HC	High Court
ICC	Indian Claims Commission
ICCP	Indian Claims Commission Proceedings
IR	Indian Reserve
JSCN	James Smith Cree Nation
MCFN	Mikisew Cree First Nation
NSCA	Nova Scotia Court of Appeal
OTC	Office of the Treaty Commissioner
PC	Privy Council
RSC	Revised Statutes of Canada
SC	Statutes of Canada
SCB	Specific Claims Branch
SCC	Supreme Court of Canada
SCR	Canada Supreme Court Reports

SCW	Specific Claims West
TARR	Treaty and Aboriginal Rights Research Centre
TD	Trial Division
TLE	treaty land entitlement

RULINGS ON GOVERNMENT OF CANADA OBJECTIONS

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INDIAN CLAIMS COMMISSION

INTERIM RULING: ATHABASCA DENESULINE TREATY HARVESTING RIGHTS INQUIRY

RULING ON GOVERNMENT OF CANADA OBJECTIONS*

PANEL

Chief Commissioner Harry S. LaForme
Commissioner Roger J. Augustine
Commissioner Daniel J. Bellegarde
Commissioner Carole T. Corcoran
Commissioner Carol A. Dutcheshen
Commissioner P.E. James Prentice, QC

COUNSEL

For the Athabasca Denesuline
David Knoll / David Gerecke

For the Government of Canada
Robert Winogron / Bruce Becker / François Daigle

To the Indian Claims Commission
Bill Henderson / Ron Maurice

MAY 7, 1993

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* Published without footnotes (1994) 1 ICCP 159.

BACKGROUND

On December 21, 1992, the Athabasca Denesuline, comprising Black Lake, Hatchet Lake, and Fond du Lac First Nations (the "Claimants"), requested that the Indian Claims Commission "conduct an inquiry into the denial of our Specific Claim by Canada." The Athabasca Denesuline argue that the terms of Treaties 8 and 10 include provision for, and protection of, their rights to hunt, fish, and trap in areas of the Northwest Territories which are north of the 60th parallel and outside the fixed boundaries described in those treaties.

The Athabasca Denesuline further contend that the Minister of Indian Affairs and Northern Development (the "Minister") has rejected their claim. On June 8, 1989, Mr John F. Leslie of the department advised the Denesuline that "your proposal [for funding] does not constitute a specific or comprehensive claim." On June 12, 1991, then Deputy Minister Harry Swain wrote to Tribal Chief A.J. Felix saying: "our legal advice is that your aboriginal rights in land north of 60 [degrees] were surrendered by Treaties 5, 8 and 10 and that actual treaty harvesting rights do not extend beyond the boundary of those treaties." On September 10, 1991, the Minister wrote to the same effect: "I agree with what my Deputy Minister, Mr. Harry Swain, indicated in his June 12, 1991 letter to you respecting your harvesting rights ..."

On January 22, 1993, the Commission agreed to conduct this inquiry and notices of that decision were sent to the parties on January 25, 1993.

The Commission is not being asked to investigate any claim based on unextinguished aboriginal or native title; nor is the Commission being asked to review the Nunavut Agreement. The fact that the Commission would not pursue such lines of inquiry was communicated to the parties at a meeting held in Toronto on April 1, 1993.

At that meeting, Mr Winogron, counsel for the Government of Canada in this matter, indicated that government may object to the jurisdiction of the Commission to conduct this inquiry. He was advised by Commission counsel at that time, and subsequently by letter dated April 5, 1993, that any objection should be made to the Commissioners in a timely fashion (the date of April 13 was suggested) setting out detailed grounds for the objection coupled with a request for a ruling from the Commissioners.

Timeliness is a factor in this matter since a panel of the Commission, consisting of Chief Commissioner Harry S. LaForme, Commissioner Carole T. Corcoran, and Commissioner Carol A. Dutcheshen, is scheduled to commence the community phase of this inquiry at Fond du Lac, Saskatchewan, on Monday, May 10, 1993.

On May 6, 1993, a panel, consisting of Chief Commissioner Harry S. LaForme together with Commissioners Carole T. Corcoran, Carol A. Dutcheshen, P.E. James Prentice, Daniel J. Bellegarde, and Roger J. Augustine, convened to hear the jurisdictional objection raised by the Government of Canada.

THE OBJECTION

Mr Winogron wrote to the Chief Commissioner on April 13, 1993, to formally advise of the objection. His letter is attached. The grounds of objection may be summarized as follows:

1 The Claimants seek a declaration of rights as opposed to compensation or damages arising from a breach of lawful obligation on the part of Government. Such a declaration is not envisioned, defined, or otherwise provided for by the Specific Claims Policy (the "Policy") and is not the proper subject matter of a specific claim.

2 The Claimants' request does not involve an "outstanding lawful obligation" as contemplated by the Policy.

3 The Claimants have not submitted this claim to the Specific Claims and Treaty Land Entitlement Branch of the Department of Indian Affairs and Northern Development.

The mandate of this Commission is set out in Order in Council PC 1992-1730, which states the following:

> AND WE DO HEREBY advise that our Commissioners on the basis of Canada's Specific Claims Policy published in 1982 and subsequent formal amendments or additions as announced by the Minister of Indian Affairs and Northern Development (hereinafter

"the Minister"), by considering only those matters at issue when the dispute was initially submitted to the Commission, inquire into and report upon:

(a) whether a claimant has a valid claim for negotiation under the Policy where that claim has already been rejected by the Minister; and
(b) which compensation criteria apply in negotiation of a settlement, where a claimant disagrees with the Minister's determination of the applicable criteria.

RULING

Mr Winogron submits that the Commission should stop this inquiry.

His first objection is that we have no power to make a declaration of rights or to grant declaratory relief. In our view, we have not been asked to do that. The Commission has in fact been asked only to conduct an inquiry into the denial of the Bands' specific claim. Reference may be had in that regard to the December 21, 1992, letter from the Bands' legal counsel.

Our mandate is to inquire into and report on "whether a claimant has a valid claim for negotiation under the Policy where the claim has already been rejected by the Minister." When we have conducted an inquiry, we are "directed" by the order in council "to submit our findings and recommendations to the parties" and to report to the Governor in Council. We propose to do that and nothing more.

Mr Winogron then argues that we should not consider the claim because the Claimants have not submitted it to the Specific Claims and Treaty Land Entitlement Branch of the Department of Indian Affairs and Northern Development. The order in council creating this Commission refers expressly to a rejection of a claim by the Minister. There is nothing in those terms of reference that confines the Commission to claims rejected in a particular way. Moreover, Mr Winogron acknowledges that the Bands are entitled to regard the Department of Indian Affairs and Northern Development response of June 8, 1989, as a rejection of their claim.

Apart from that, the above argument is a somewhat extraordinary submission in the circumstances of this claim. The department's rejection resulted from a request for funding to pursue the claim through the very process to which Mr Winogron points. The department refused to provide funds to allow the claim to go through the process. Mr Winogron now argues that because the claim has not gone through the process we cannot consider it. With respect, we disagree.

Finally, Mr Winogron submits that the claim is not one provided for in the Policy because it does not involve an "outstanding lawful obligation" as contemplated by that Policy.

We have been asked by the Claimants to inquire into their claim that they have rights under Treaties 8 and 10 to harvest by hunting, fishing, and trapping in areas of the Northwest Territories north of the 60th parallel.

The term "specific claim" is defined in the booklet setting out the 1982 Policy, *Outstanding Business*,[1] which is incorporated into our terms of reference. Mr Winogron accepts that the definition of "specific claim" is found in *Outstanding Business*. On page 7 of *Outstanding Business*, "specific claim" is defined as referring "to those claims which relate to the administration of land and other Indian assets and to the fulfillment of treaties." This definition is repeated on page 19 under the general heading "The Policy: A Renewed Approach to Settling Specific Claims."

On page 20, *Outstanding Business* states "[t]he government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding 'lawful obligation.'"

Outstanding Business goes on to say:

> A lawful obligation may arise in any of the following circumstances:
>
> i) The non-fulfillment of a treaty or agreement between Indians and the Crown.

The Claimants' position is that the government has refused on more than one occasion to "recognize" this claim to treaty rights and that the Minister has specifically rejected the Bands' claim that these treaty rights exist. They rely on letters written by the Minister or on his behalf which they have filed to demonstrate this.

The government position is that in order to fall within the Policy, as stated in *Outstanding Business*, a claim must be one that can be compensated by way of land or money. Mr Winogron argues that, because *Outstanding Business* contemplates compensation for a breach of lawful obligation in terms of land or money, that is the only kind of claim into which the Commission is authorized to inquire. Mr Winogron submits that this is not such a claim.

This Commission has been mandated to inquire into and report on whether Claimants have a valid claim under the Specific Claims Policy in circumstances where the Minister has rejected the claim. We consider it premature to dispose of Mr Winogron's argument that this claim does not fall within *Outstanding Business* until such time as we have completed the inquiry. The very purpose of the inquiry is to decide whether or not there is a valid specific claim and whether it has been rejected. The issue which Mr Winogron raises we regard as an important issue which we must consider as part of the overall inquiry.

---

[1] Department of Indian Affairs and Northern Development (DIAND), *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982); reprinted in (1994), 1 ICCP 171.

Mr Winogron argues that this Commission must be satisfied that the facts of this case fall squarely within the Policy before this Commission proceeds to an inquiry. We disagree. In our view, the Commission must, at this juncture, examine the circumstances of the case and need only be satisfied that:

1. the claim has been advanced to the government;
2. the Claimants allege non-fulfilment of federal obligations under Treaties 8 and 10, to which they are parties;
3. the claim has been rejected by the Minister as a specific claim;
4. the claim has been advanced before this Commission by the Claimants as a matter still in dispute; and
5. the Claimants have an arguable case that their claim falls within the Policy.

The Commissioners take the view that these requirements have been met and that the Commission has properly embarked upon its inquiry.

Throughout the inquiry, the Commission will keep in mind the points Mr Winogron has raised, and it may be that we will have to return to them at a later point.

This matter was considered in Saskatoon on May 6, 1993, by the following Commissioners:

Chief Commissioner Harry S. LaForme
Commissioner Roger J. Augustine
Commissioner Daniel J. Bellegarde
Commissioner Carole T. Corcoran
Commissioner Carol A. Dutcheshen
Commissioner P.E. James Prentice, QC

Dated this 7th day of May, 1993.

Harry S. LaForme, Chief Commissioner
FOR THE INDIAN CLAIMS COMMISSION

Department of Justice Canada
Ministère de la Justice Canada

Ottawa, Canada
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Specific Claims Ottawa
DIAND Legal Services
Trebla Building, Room 1157
473 Albert Street

April 13, 1993

Harry S. LaForme
Chairman and Chief Commissioner
INDIAN CLAIMS COMMISSION
110 Yonge Street, Suite 1702
Canada Trust Building
Toronto, Ontario, M5C 1T4

Dear Mr. LaForme:

Athabaska Denesuline Claim - Indian Claims Commission

Further to our attendance at the consultation conference on the above matter on April 1, 1993, we are writing to formally advise of our objection to the Commission's jurisdiction to inquire into the Athabaska Denesuline matter.

The claimants have asked the Commission "to review Canada's blanket denial of the existence of any Denesuline treaty rights, including harvesting rights, in the N.W.T.". They claim to have treaty rights in their traditional territories in the N.W.T. and argue that "Treaties 8 and 10 cover all of the traditional lands of the Denesuline, notwithstanding that the descriptions of the treaty boundaries contained in the written versions of those treaties would exclude those traditional lands". Alternatively, they argue that their treaty rights to hunt, trap and fish extend beyond the current boundaries of these treaties in areas covered by the "blanket extinguishment clause" in the treaties.

The operative provision of the Order in Council establishing the Commission under Part I of the Inquiries Act states:

> "AND WE DO HEREBY advise that our commissioners on the basis of Canada's Specific Claims Policy published in 1982 and subsequent formal amendments or additions as announced by the Minister of Indian Affairs and Northern Development, by considering only those matters at issue when the dispute was initially submitted to the Commission, inquire into and report on:
>
> a) whether a claimant has a valid claim for negotiation under the Policy where the claim has already been rejected by the Minister;"

Canada

a) whether a claimant has a valid claim for negotiation under the Policy where the claim has already been rejected by the Minister;"

The Government's policy on specific claims states that it will:

> "recognize claims by Indian bands which disclose an outstanding "lawful obligation", i.e., an obligation derived form the law on the part of the federal government.
>
> A lawful obligation may arise in any of the following circumstances:
>
> i) The non-fulfilment of a treaty or agreement between Indians and the Crown.
>
> ii) A breach of an obligation arising out of the Indian Act or other statutes pertaining to Indians and the regulations thereunder.
>
> iii) A breach of an obligation arising out of government administration of Indian funds or other assets.
>
> iv) An illegal disposition of Indian land."

Based upon the above, our objections are as follows:

1) The claimant is not claiming any compensation or damage arising from the breach of a lawful obligation by the Crown. The claimant's request is not one which can be defined as a claim under the policy, but rather, they seek a declaration of treaty rights. Declaratory relief is properly a subject matter for the Federal Court of Canada and is not properly the subject matter of a specific claim under the Specific Claims Policy. The Commission's empowering Order-in-Council authorizes it to inquire into and report on whether the claimants have a valid claim on the basis of the policy. On the basis of the policy there can be no claim for declaratory relief since the policy does not provide for it, define it nor envision it.

2) The claimant's request is not a claim as provided for in the Specific Claims Policy. This request does not involve an "outstanding lawful obligation" as contemplated by the Policy.

3) The claimant has not submitted a claim to the Specific Claims and Treaty Land Entitlement Branch of the Department of Indian Affairs and Northern Development.

3

As a result the Commission is without jurisdiction to inquire into and report on a matter which is not a claim.

As per the instruction in Mr. Henderson's letter of April 5, 1993, we are requesting a ruling from the Commissioners with respect to this matter.

We look forward to hearing from you.

Robert Winogron

c.c. Carol A. Dutcheshen
Carole Corcoran
Bill Henderson
David Knoll

RW/nvc

INDIAN CLAIMS COMMISSION

INTERIM RULING
LAC LA RONGE INDIAN BAND INQUIRIES
CANDLE LAKE AND SCHOOL LANDS CLAIMS

RULING ON GOVERNMENT OF CANADA OBJECTIONS

PANEL

Commission Co-Chair Daniel J. Bellegarde
Commission Co-Chair P.E. James Prentice, QC
Commissioner Roger J. Augustine
Commissioner Carole T. Corcoran
Commissioner Aurélien Gill

COUNSEL

For the Lac La Ronge Indian Band
Douglas Kovatch / James D. Jodouin

For the Government of Canada
Bruce Becker

To the Indian Claims Commission
Robert Reid / Kim Fullerton / Ron Maurice

MAY 9, 1995

BACKGROUND

At their recent meeting the Commissioners considered the government's mandate challenge to the Commission proceeding with the inquiry into this matter. (While there are really two separate claims, the parties agreed that if they were to proceed they would be dealt with in one inquiry.) Mr Becker's submission of February 20 and April 18 and Messrs Kovatch and Jodouin's of March 14 and April 18 were considered and discussed at length.

While the submissions were lengthy, and the Commissioners are grateful to counsel for their exhaustive review of the matter, they concluded that one factor must govern. That factor is fairness.

The government's position is, briefly, that, unless a rejection occurred as part of the process set out in *Outstanding Business* (the Specific Claims Process),[1] it was not a rejection within the Commissioners' terms of reference. As Mr Becker put it, "[t]he rejection must be in relation to a claim submitted to Canada under the Specific Claims Policy." The result was that, even though these very claims, as asserted in litigation, had been expressly rejected by the Senior Assistant Deputy Minister of the Department of Indian Affairs and Northern Development (DIAND), Mr Richard Van Loon, in April 1992, it is not open to the Commission to inquire into them.

The claimant's position is, essentially, that the rejection amounted, in substance if not in form, to a rejection of their claim in the specific claims process.

The factors that the Commissioners regard as cogent may well be peculiar to this inquiry. One way or the other, they relate to the issue of fairness.

---

[1] Department of Indian Affairs and Northern Development (DIAND), *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982); reprinted in (1994), 1 ICCP 171.

FAIRNESS TO THE BAND

The Commissioners observe that the government first informed the parties of their intention to conduct an inquiry into the rejection of these claims in March 1993. It was open to the government to raise a challenge at that time, but none was made until the planning conference held on January 25, 1995, nearly two years later. This challenge came as a surprise to claimant's counsel, who had obviously assumed that the inquiry was to proceed and had invested much time and effort in preparing for it. An arrangement among counsel that the inquiry into these two claims would await the conclusion of the "hearing" stage of the Commission's inquiry into the La Ronge treaty land entitlement (TLE) claim rested on the assumption that the inquiry into these two claims would proceed sequentially in due course. It is apparent that at no time during the lengthy process of the Commission's inquiry into the Band's TLE claim did the government intimate that objection would be taken to the Commission conducting inquiries into these claims.

Can the government's objection be met by the Band now formally submitting its claims in the specific claims process? The Band offered to do so as a "compromise" to the government's objection, if the process could be completed reasonably quickly. Serious problems arose over this proposal. One is that the government has given no indication that there is any prospect of the claims' being accepted for negotiation. The Band was not told the basis for Mr Van Loon's rejection. If it was because the information provided to Canada in terms of supporting historical evidence or legal submissions was insufficient, the government has not indicated what further information is necessary in order to advise the Minister on the merits of the claims. Since the Band does not know what is lacking, it is a question whether the time and money required to formally submit a claim through the specific claims process can be justified.

Then there is the question of time. While government counsel suggested six to nine months might be required to consider the two claims if launched now in the specific claims process, that was obviously an estimate; no one can predict how long it will take.

There is another, more cogent obstacle. It is that the government refuses to consider a claim in the specific claims process if the claim is in concurrent litigation. In order for the claim to be considered, the litigation must be placed in abeyance. Since there is no such requirement in ***Outstanding Business***, it appears to be simply general government policy. It effectively forces a claimant to choose whether to proceed in the courts or through the specific claims process.

Although Canada's unwritten policy may be justifiable in some circumstances to avoid unnecessary litigation, particularly where there is a reasonable prospect of a negotiated settlement, it is unreasonable to suggest that the First Nation should place the litigation in abeyance and submit a specific claim where senior government officials have already emphatically denied that the claim has any historical or legal merit.

Litigation, which eventually included all three claims presently before the Commission (Treaty Land Entitlement, Candle Lake, and the School Lands), was commenced in 1986. It has been actively pursued and has reached the point where a judge has been appointed to manage it, and a pre-trial management hearing has occurred. It is scheduled for trial early next year. The Band has invested years of effort and expense in it. Yet the Band is, in effect, being told by the government that its action must be virtually abandoned and that two further statements of claim involving the same issues must be prepared and submitted to DIAND in accordance with the specific claims process, and that the Band must wait an unpredictable period of time while the government considers whether to accept claims it has already rejected.

The other consequence of submitting a claim in the specific claims process would be to delay the Commission's inquiry for the same unlimited period, for the Band would have to abandon its position that the claims have already been rejected and there would be no basis for an inquiry.

In the Commissioners' opinion, the policy of preventing claimants in litigation with the government from pursuing at the same time the alternatives to litigation, which the government has provided through the specific claims process and the Commission's inquiry process, simply contradicts the object of those processes. While the Commissioners accept that the specific claims process is, as Mr Becker strongly asserts, an alternative to litigation, they do not accept that the processes must be treated as mutually exclusive or were intended to be so treated.

This policy appears to have been adopted by the government to serve its own convenience, by avoiding involvement on two "fronts" at the same time over the same claim. No other rationale has been suggested for it. Its application in the circumstances of this case would result in manifest unfairness to the Band.

Before leaving this point it is worth considering why the Band did not submit these claims to the specific claims process at an earlier point? The answer appears to be that, if the Band was formerly aware of the policy requiring litigation to be held in abeyance, it is unlikely it would have been any readier to do that than it is now. Even if the Band was unaware of that policy, it is reasonable to assume that the Van Loon rejection appeared to foreclose that option, given that the government was apprised of the historical background and the legal basis of the claims, and no doubt advised by counsel. It is also worth noting that the government took no objection to the Commissioners' conducting an inquiry into the treaty land entitlement claim, notwithstanding that it had never been formally placed into the specific claims process. In light of these considerations, it is unreasonable to fault the Band for failing to submit the claim in the specific claims process at an earlier point.

FAIRNESS TO THE GOVERNMENT

Mr Becker argues that his objection is not merely formal and that it rests on something more than the fact that the rejection of the claims occurred in the course of the litigation rather than in the specific claims process. To quote Mr Becker, "[t]he Office of Native Claims (now Specific Claims West) has not had the opportunity to review the claim as the (Specific Claims) policy contemplates, and neither has the claim been submitted to the Department of Justice for an opinion on whether there is an outstanding lawful obligation under the policy."

The Commissioners note that the rejection letter of April 29, 1992, was explicit. It was written by the "Senior Assistant Deputy Minister for the Claims Program, responsible for the Litigation Support Directorate (and hence the settlement for Treaty Land Entitlements) through the Specific Claims and Treaty Land Entitlement Branch." It rejected the TLE claim, and went on to say, "[t]he Department of Indian Affairs is convinced that the lands at Candle Lake and 'school lands' never became reserves and that a court would concur."

This letter was written some six years after the litigation had been commenced. During that time there were extensive and protracted discussions over settlement of the three claims. The Office of the Treaty Commissioner (OTC) for Saskatchewan was involved. The claims were set out extensively in a "Green Paper" submitted to the OTC in August 1990. The government was privy to all of these discussions.

In light of this, the Commissioners feel entitled to assume that the rejection of the claim was on the basis of adequate information and legal advice. Indeed, they find it difficult to imagine that the rejection could have occurred without legal advice. There was no suggestion that more information was needed. What further information would have resulted from the claims being placed into the specific claims process has not been explained. It is thus difficult to see what purpose of the government's would be served by requiring the Band to place the claims into the process.

It is thus difficult for the Commissioners to understand how the government can claim disadvantage or prejudice through lack of an adequate opportunity to consider the claims on their merits. Claimant's counsel have described the circumstances in which the claims were rejected. They point out that, in the course of the litigation, "all of the information that would normally be supplied to the Specific Claims Branch in the format of their (Specific Claims) policy was in fact supplied to Canada. The history of the claims, together with extensive historical documentation, and extensive legal argument, was all provided." They add: "Nothing else of any significance is required...."

Still, if Indian Affairs feels at a disadvantage, either because it has not had an adequate opportunity to review the materials and needs more time, or because more research is needed, the Commissioners will be pleased to grant a reasonable adjournment. The Commissioners are firmly of the view that they must strive to be fair to both parties, not only claimants, and will attempt to avoid any unfairness the government feels their decision to proceed with the inquiry causes.

Moreover, if DIAND believes that more research is needed, the Commissioners are ready to offer the Commission's research facilities to assist with it and the claimant as well.

Before reaching these conclusions the Commissioners considered the other points raised by the parties. Given the views outlined above, not all need be dealt with. However, Mr Becker's submission – that, if the Commission were to proceed, the "perverse" prospect arises of claimants avoiding the very process the Commission was appointed to review – requires a response. The submission is that, if the Commissioners were to proceed with an inquiry, claimants in other cases would simply file a statement of claim in court and wait for the government to file a statement of defence. Then, on the theory that the statement of defence amounted to a rejection by the Minister, they would proceed directly to the Commission, and this way circumvent the specific claims process.

The Commissioners are of the view that this would not occur, because a statement of defence, by itself, could not reasonably be regarded as a rejection by the Minister. This claim has been rejected by, or on behalf of, the Minister. To proceed with the inquiry would not provide a precedent for the general avoidance of the Specific Claims Policy, which Mr Becker fears.

Much of Mr Becker's argument rests on formalities. It requires a strict and narrow interpretation of the Commissioners' mandate. The Commissioners interpret their mandate as remedial. Accordingly, they interpret it broadly to achieve its objective, which is to ensure, to the best of their ability, that claims which may be reasonably considered to fall within it are disposed of fairly.

Mr Becker claims "settlement privilege" for the letter on the ground that it was written in the course of settlement discussions, and that the Commission's "inquiry process will be conducted on a 'without prejudice' basis." Beyond that, he has asked the Commission to "keep the confidentiality of the letter by not treating it in a public manner" and, since his written submissions "contain references to the content of the letter, the Commission and that the band treat this document as confidential as well."

Counsel for the Band take the view that the letter was not produced in circumstances entitling the government to claim privilege for it.

The Commissioners have often stated that the Commission is not a court. There is clearly no agreement between the parties on the issue of privilege for the letter. The Commissioners have no power to decide questions of privilege, or to stamp any proceedings "privileged." While they always attempt to respect requests of confidentiality, they cannot permit that to prevent them from carrying out their mandate. They could not possibly deal with the government's objection without referring to the letter, since counsel for both parties have done so, and quoted from it explicitly, and since it forms the basis for the Band's response to the government's objection. Whether or not it is a privileged document will have to await the decision of a court, if the matter ever comes up. (How the disclosure of a letter, which constitutes a clear denial of liability, could prejudice the government is difficult to apprehend).

As the parties' counsel have already been informed, the Commissioners intend to proceed with the next step in the inquiry, the community session scheduled for June 13. If Mr Becker wishes to accept any of the Commissioners' offers they request that he notify them promptly. They request also that the government's documents be provided as quickly as possible to facilitate preparation of the historical research prior to the June 13 sessions.

If counsel have any comments, or questions arising out of this letter, I would be pleased to hear from you, and to communicate them to the Commissioners if you so desire.

FOR THE INDIAN CLAIMS COMMISSION

Robert F. Reid
Legal and Mediation Advisor

Dated this 9th day of May, 1995.

INDIAN CLAIMS COMMISSION

INTERIM RULING
MIKISEW CREE FIRST NATION INQUIRY
TREATY ENTITLEMENT TO ECONOMIC BENEFITS CLAIM

RULING ON GOVERNMENT OF CANADA OBJECTIONS*

PANEL

Commission Co-Chair Daniel J. Bellegarde
Commission Co-Chair P.E. James Prentice, QC
Commissioner Carole T. Corcoran

COUNSEL

For the Mikisew Cree First Nation
Jerome N. Slavik

For the Government of Canada
François Daigle

To the Indian Claims Commission
Ron Maurice

NOVEMBER 18, 1996

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* Published (1998) 6 ICCP 209.

BACKGROUND

I am writing in regard to Canada's challenge to the mandate of the Commission to conduct an inquiry into this matter. Further to my verbal communication on September 17, 1996, Co-Chair Dan Bellegarde has carefully considered the written submissions of the parties and decided to proceed with the inquiry as requested by the Mikisew Cree First Nation (MCFN).

While due regard has been paid to the submissions of the parties, the principle of fairness was the governing factor in the decision to proceed with the inquiry. After considering the nature of the issues involved and the amount of time that this claim has been under review by the Specific Claims Branch, Co-Chair Bellegarde concluded that Canada has had sufficient time to determine whether an outstanding "lawful obligation" is owed to the MCFN. Under the circumstances, he considered the lengthy delay as being tantamount to a rejection of the claim for the purposes of determining whether the Commissioners have authority to proceed with an inquiry under their terms of reference. He also felt that it would be unfair and prejudicial to the MCFN if they did not proceed with the inquiry because this could effectively deprive the MCFN from having its claim reviewed by an independent third party. Furthermore, the inquiry has been scheduled in such a manner as to provide Canada with additional time to respond to the merits of the claim before proceeding with written and oral submissions. If Canada decides to accept the claim, it will not be necessary for the Commission to complete the inquiry.

The chronology of this claim and the detailed reasons for the decision are set out below.

CHRONOLOGY OF THE CLAIM

1 January 1993 – MCFN files specific claim to economic entitlements under Treaty 8 to Specific Claims West (SCW).

2 October 20, 1993 – SCW forwards a discussion paper providing Canada's preliminary analysis of the claim to Mr Slavik.

3 March 29, 1994 – Allan Tallman, SCW, advised Mr Slavik that Canada's preliminary position is that the claim does not establish an outstanding lawful obligation on the part of Canada. Canada offers MCFN opportunity to provide additional evidence or written arguments to be taken into consideration.

4 July 15, 1994 – Parties meet to discuss Canada's preliminary position and new arguments are presented to SCW by the MCFN. Following this meeting, SCW agreed to conduct research into the implementation of the agricultural and farming provisions of Treaty 8.

5 January 30, 1995 – SCW circulates copy of draft report entitled "Economic Benefits and Treaty No. 8 Bands in Alberta 1899–1940."

6 May 5, 1995 – Chief Waquan wrote to Rem Westland, Director General, Specific Claims Branch (SCB), seeking decision on the claim.

7 June 12, 1995 – Letter from Rem Westland to Chief Waquan on a "without prejudice" basis acknowledging that "there may be an obligation under Treaty 8 to provide the articles specified in Treaty 8 to the MCFN." Mr Westland offered the following two options to the MCFN on how to proceed: "The MCFN may pursue the specific claims process or can await the outcome of (and/or participate in) the developing Indian-Government process to determine how treaties should be understood and implemented in contemporary terms. Subject to your agreement and a formal letter accepting your claim from DIAND's Assistant Deputy Minister of Claims and Indian Government, the Specific Claims Branch is prepared to enter into discussions concerning the First Nation's claim within the parameters of the Specific Claims Policy and DIAND's legal position."

8 August 2, 1995 – Letter from Manfred Klein, SCW, to Chief Waquan confirming that SCW would be prepared to negotiate a claim with MCFN subject to the conditions set out in the June 12th letter.

9 August 17, 1995 – Letter from Chief Waquan to Manfred Klein indicating the MCFN is prepared to enter into negotiations for settlement of the specific claim.

10 December 19, 1995 – Mr Slavik requests response from acting Director General, Mike Bouliane, regarding the status of "acceptance package" of the claim.

11 January 22, 1996 – Letter from Chief Waquan to Deputy Minister Scott Serson requesting meeting to discuss why the claim had not been accepted. Chief Waquan states that Mr Bouliane advised the MCFN before Christmas that consideration of the claim had been held up "for a number of so-called policy reasons" and that Mr Bouliane had expressed concerns regarding the "precedent effect" and the potential "cost to Canada" if the claim were accepted for negotiation.

12 February 7, 1996 – Letter from Mike Bouliane to Chief Waquan stating that the "processing of the acceptance package is being held in abeyance" while the issue of entitlement to economic benefits was "under active review by the department from a policy perspective." Mr Bouliane stated that he expected a decision from the department within a period of three months.

13 February 23, 1996 – Letter from Jerome Slavik to the Indian Claims Commission requesting an inquiry into "deemed rejection" of the claim.

14 June 12, 1996 – Letter from François Daigle to Isa Gros-Louis Ahenakew, ICC, objecting to the Commission proceeding with the inquiry because "Canada does not agree or admit that the claim had been rejected."

15 June 14, 1996 – At ICC Planning Conference in Ottawa, François Daigle objects to mandate of Commission to proceed with inquiry. In a letter on that date, Mr Michel Roy, Director General of Specific Claims Branch, reiterated that the review of the claim had been "held in abeyance pending a review of the issue by the department from a policy perspective. Although the intention was to complete the review within three months, circumstances have not allowed us to do so." Mr Roy advised that he was "fully committed to having it reviewed by senior officials of the department."

16 June 27, 1996 – Letter from Michel Roy to Jerome Slavik responding to proposal made during the June 14th planning conference. Mr Roy states that "[u]nfortunately, this Department is not in a position to advise before July 31, 1996 whether your client's claim will or will not be accepted for negotiation pursuant to the Specific Claims Policy. We are also unable to agree that this claim be 'deemed' rejected for the

purposes of an inquiry by the Indian Claims Commission." Mr Roy reiterated that the claim was under active consideration by the department.

17 July 24, 1996 – Letter from Chief Waquan to Michel Roy stating that the MCFN was "disappointed" that after three and a half years DIAND was continuing to procrastinate and delay acceptance of the claim.

POSITIONS OF THE PARTIES ON THE MANDATE OF THE COMMISSION

In Canada's written submissions dated August 1, 1996, Mr Daigle submitted that the question of whether the Commission has a mandate to conduct an inquiry into this claim could be determined on a preliminary basis since the issue of rejection is not inextricably tied to the substantive aspects of the claim. For the purposes of determining this preliminary question, Mr Daigle stated that the Commission cannot "deem" a claim to be rejected; rather, the relevant question is "whether Canada's conduct is tantamount to a rejection." In Canada's submission, it is not.

Mr Daigle provided a brief recitation of the terms of reference contained in the Order in Council establishing the Commission and the salient facts in support of his assertion that the Commissioners do not have a mandate to proceed with an inquiry into this matter because it has not been rejected. Mr Daigle referred to two previous decisions of the Commission to proceed with inquiries (the Athabasca Denesuline and the Lac La Ronge Indian Band) as support for the view that there must be a "rejection of the claim on its merits" before the Commission can proceed with an inquiry. While Mr Daigle acknowledged that Canada's preliminary review of the claim in March 1994 did not disclose an outstanding lawful obligation, he stated that further evidence and arguments have been presented to the department and no decision has been made conclusively one way or another. The crux of Canada's argument is that the claim has simply not been rejected. According to Mr Daigle, "DIAND has not completed its review of the claim and has not yet determined whether, on its merits, the claim should be accepted or rejected pursuant to the Specific Claims Policy.'

The Mikisew Cree First Nation's position is set out in a letter from Mr Jerome Slavik to the writer dated August 15, 1996. Mr Slavik asserts that there is ample case authority to support the view that administrative bodies created under statute have the requisite authority and discretion to make decisions with respect to their jurisdiction, subject to judicial review of such decisions. While the Commission must satisfy itself that a claim has been rejected by the Minister before it can proceed with an inquiry into the claim, Mr Slavik asserts that the ICC has the authority to determine what constitutes a "rejection." Aside from an express rejection in writing or verbally, Mr Slavik suggests that a rejection can be based on "the action, inaction, or other conduct, such as the refusal or inability to make a decision of the Crown within a reasonable period of time, which is tantamount to a rejection, despite claims to the contrary."

Mr Slavik stated that, where a claim has been before the Crown for a reasonable period of time and no decision has been made, it is necessary to conclude at some point that the claim has essentially been rejected in order to allow the First Nation to pursue other alternatives. Although not directly applicable to the particular facts and circumstances before the Commission, Mr Slavik referred to three cases dealing with applications for *mandamus* to compel a public authority to make a decision. In *Austin v. Minister of Consumer and Corporate Affairs* (1986), 12 CPR (3d) 190, the court held that, despite the absence of a statutory time limit, an authority under a legal duty to make a decision must do so within a reasonable period of time. In *Bhatnager v. Minister of Employment*, [1985] 2 FC 315, the court issued an order of *mandamus* requiring that the department make a decision on an immigration application by a certain date. While the court could not order the department to decide the outcome in a particular manner, it could issue *mandamus* owing to the lengthy delay in making the decision and the absence of an adequate explanation for the delay. Finally, Mr Slavik cited *Ermineskin Band Council v. Registrar of Indian and Northern Affairs*, [1987] 2 CNLR 70 where the court found that the Registrar was under a statutory duty to make a decision in regard to a membership protest filed by the Band. Mr Justice Strayer stated that "*[w]hile there has been no express rejection of this demand, more than enough time has passed for a response and none has been forthcoming. This is tantamount to a refusal to decide.*" Therefore, Strayer J concluded that by "refusing or failing to give a decision on either of these protests, the Registrar is preventing an appeal to a court at his interpretation of the law. I am not able to conclude that Parliament intended such a result." In *Ermineskin*, the delay involved was slightly less than two years from the time when the Band filed its first objection to the Registrar. Mr Slavik submitted that the facts in this case are similar because the MCFN might be deprived of an opportunity to have the claim reviewed by the Commission given that the mandate expires on March 31, 1997.

THE COMMISSIONERS' REASONS

As mentioned previously, the Commission has decided to proceed with an inquiry into this matter. However, oral submissions will be scheduled to proceed no earlier than January of 1997. Taking into account the case authorities cited above it is clear that, while they have no direct application because the Commission cannot provide discretionary remedies like a court of equity, they are instructive on the question of whether Canada's delay in responding to the merits of the claim is tantamount to a rejection. Further support for the decision to proceed with the inquiry on account of lengthy delay can be found in the following authorities.

In *Re Friends of Oldman River Society* (1993), 105 DLR (4th) 444 (FCTD) the court offered its views on what constituted a reasonable period of time for a decision to be exercised under statute. The court held that the complexity of the subject matter has a direct bearing on whether there has been unreasonable delay under the circumstances. The court declined to order *mandamus* to compel the Minister of Transport to implement the recommendations of an environmental assessment panel, since only 14 months had lapsed since the release of the panel's report and recommendations. The court held that there had been no unreasonable delay but remained seized of the matter to ensure that some forward progress was achieved.

In *R. v. Stapleton* (1983), 6 DLR (4th) 191 (NSCA) – a Charter case involving an application to have criminal charges dismissed on the grounds that there had been unreasonable delay in bringing the matter to trial – the court held that prejudice was a relevant factor in determining whether there was unreasonable delay. Also, the court stated that what constitutes a reasonable time depends on the circumstances.

In *Re Delmas and Vancouver Stock Exchange* (1994), 119 DLR (4th) 136 (BCSC), the court dealt with an application for prohibition and *certiorari* challenging the jurisdiction of the Vancouver Stock Exchange to proceed with disciplinary proceedings against the applicant. While a great deal of curial deference will be shown to bodies such as the Stock Exchange because of the highly specialized nature of the functions it performs, this case seems to suggest that the courts are generally reluctant to grant prerogative relief against the decisions of tribunals and administrative bodies. Although it is acknowledged that this case is not directly on point, it provides support for the view that the Commission can determine whether unreasonable delay is tantamount to a rejection of claim and that such decisions will generally be respected by the courts.

The Commission decided to proceed with the inquiry because Canada has had a reasonable period of time to respond to the merits of the claim. It is significant that the Specific Claims Branch initially offered to enter into negotiations with the MCFN under the policy on June 12, 1995, subject to a formal letter of acceptance from DIAND Assistant Deputy Minister of Claims. Over 17 months have passed and Canada has yet to respond to a discrete legal question – namely, whether the MCFN received any of the economic entitlements promised under Treaty 8. While the Commission appreciates that there are interpretive questions relating to the nature and scope of the treaty right, these issues are more properly the subject matter of settlement discussions.

The simple question is whether there are unfulfilled treaty obligations within the meaning of the Specific Claims Policy. Canada's delay in responding to the merits of this claim is not warranted under the circumstances because the delay appears to be related to issues which are extraneous to whether Canada has fulfilled its lawful obligations under Treaty 8. Simply put, questions related to the "precedent effect" or "potential cost to Canada" do not bear any relationship to the legal question in this matter. Even if the Commission were to conclude that it was justifiable for Canada to consider the broader policy implications of accepting the claim, the apparent lack of clarity in the policy (which was developed 14 years ago) cannot provide a justifiable reason for the patent delay in this case.

Given the narrow legal and factual questions before the Commission, there is no apparent reason why the Specific Claims Branch has not been able to accept or reject the claim within a period of 17 months. In February 1996, the Specific Claims Branch itself estimated that the review would be completed within three months when the MCFN first pressed for a decision on the claim. The claimant has provided enough information for Canada to make a decision and, indeed, no further requests for information have been made by Canada. Since Canada refused to provide a certain date within which to respond and has not offered any valid explanation for the delay, other than to say that it is under active review, it is justifiable to conclude that a 17-month delay is tantamount to a rejection of the claim for the purposes of responding to the MCFN's request for an inquiry.

Finally, questions of fairness and prejudice have been taken into account. First, the Commission's decision to proceed with the inquiry is not manifestly unfair or prejudicial to Canada. Although the Commission will hear community testimony on November 26, 1996, from the MCFN, written and oral submissions will not proceed until January 1997 at the earliest. The timing of the Commission's inquiry into this matter provides sufficient time for the Specific Claims Branch to consider the matter and make a decision on whether to accept the claim for negotiation.

While the Commissioners' decision to proceed with the inquiry will require that Canada expedite its internal review of the claim, they felt obligated to proceed with the inquiry as requested. The MCFN is simply requesting a timely response from Canada on the merits of the claim. If the claim is not accepted for negotiation, the MCFN would then be in a position to seek an inquiry before the Commission or commence legal proceedings in the courts as a manner of seeking redress. To not proceed with the inquiry would occasion further delay and could frustrate the efforts of the MCFN to have its claim reviewed by an independent third party. Any further delay could effectively prevent an appeal to the Commission before March 1997 and could also prejudice the MCFN's ability to seek a legal remedy through the courts if the claim is ultimately barred through limitations periods or the doctrine of laches. In the Commission's view, such a result would not be fair in view of the narrow issue that is before Canada and the Commission.

If you have any questions or comments in regard to any of the above, please feel free to contact me at 613-947-3945.

FOR THE INDIAN CLAIMS COMMISSION

Ron S. Maurice
Commission Counsel

Dated this 18th day of November, 1996.

INDIAN CLAIMS COMMISSION

INTERIM RULING
WALPOLE ISLAND FIRST NATION INQUIRY
BOBLO ISLAND CLAIM

RULING ON GOVERNMENT OF CANADA OBJECTIONS

PANEL

Commission Co-Chair Daniel J. Bellegarde
Commissioner Roger J. Augustine

COUNSEL

For the Walpole Island First Nation
Russell Raikes / Carol Godby

For the Government of Canada
Robert Winogron / Carole Vary

To the Indian Claims Commission
Ron Maurice

SEPTEMBER 21, 1998

BACKGROUND

The purpose of this letter is to inform counsel for the parties of an interim ruling by the Commission with respect to a mandate challenge raised by Canada in a letter dated March 23, 1998. The following is a brief summary of the decision.

On April 9, 1996, the Walpole Island First Nation, hereafter referred to as the "First Nation," requested the Indian Claims Commission to inquire into the rejected specific claim of the First Nation regarding Boblo Island. Notification of the rejection of the claim by Canada was given in a letter dated November 24, 1995.

The parties met in a planning conference held in Ottawa on July 12, 1996. We note that the issues decided as between the parties include:

Issue 1 a) Does the Surrender of May 15, 1786 contravene the provisions of the Royal Proclamation of 1763?

Issue 2 a) Were the Chiefs and principal men of the Walpole Island First Nation signatories to the alleged surrender of May 15, 1786?
b) If they were not, does this make the surrender invalid with respect to the Walpole Island First Nation?

Issue 3 a) Was there consideration for the transaction?
b) If there was not, does this render the surrender invalid?

Issue 4 a) Were the lands used for the purpose for which they were surrendered?
b) If they were not, does this render the surrender invalid?
c) If they were not used for the purpose for which they were surrendered, but this does not render the surrender invalid, is compensation payable?

d) Was the crown obliged to return the Island to the First Nation upon ceasing to use those lands for military purposes?

Issue 5 a) Did the Crown and/or Indians regard the surrender of 1786 as invalid when they entered into the surrender of 1790?
b) If so, what is the effect of the 1790 surrender on the alleged surrender of 1786?

Issue 6 Is the Crown stopped from relying upon the surrender of 1786?

Issue 7 To what extent is the Walpole Island First Nation entitled to the use and benefit of the reservations flowing from the rights under the patent?

Issue 8 Did the Crown breach its fiduciary obligations in obtaining the surrender?

The mandate of the Indian Claims Commission is set out in Order in Council PC 1991-1329, with subsequent amendments, providing the Commission with the authority to "by considering only those matters at issue when the dispute was initially submitted to the Commission, inquire into ... a) whether a claimant has a valid claim for negotiation under the Policy where that claim has already been rejected by the Minister." In the final report of the specific claim of the La̱x Kw'a̱laams First Nation (reported [1995] 3 ICCP 167), we concluded, with respect to our mandate, that "the mandate of this Commission is remedial in nature and that its purpose is to provide a process to independently review the application of the Policy by Canada to individual claims ... [O]ur mandate is then very broad, allowing us to report on almost any topic relating to specific claims, and very specific, permitting us to inquire into the details of a particular claim."

We conclude that the primary issue that is before the Commission is whether or not the surrender of 1786 conforms with provisions of the Royal Proclamation. The First Nation has requested that the Commission determine whether the Crown breached any lawful obligation within the context of the Specific Claims Policy which may give rise to issues of compensation. Although one of the sub-issues may result in a conclusion relating to aboriginal title, and it may very well be that the conclusion by the Commission is that it has no jurisdiction to make such a finding, this does not preclude the inquiry from proceeding. Thus, the Commission is within its mandate to convene an inquiry with respect to this specific claim of the First Nation.

The Commission has noted the objection raised by Canada that a potential finding by the Commission that the Chiefs and principal men of the Walpole Island First Nation were not signatories to the surrender of 1786 would result in a claim for aboriginal title and, thus, outside of the scope of Canada's Specific Claims Policy. The Commission will address this objection in the Final Report with respect to this specific claim of the First Nation.

FOR THE INDIAN CLAIMS COMMISSION

Daniel Bellegarde Roger Augustine

Daniel J. Bellegarde
Commission Co-Chair

Roger J. Augustine
Commissioner

Dated this 21st day of September, 1998.

INDIAN CLAIMS COMMISSION

INTERIM RULING: SANDY BAY FIRST NATION INQUIRY TREATY LAND ENTITLEMENT CLAIM

RULING ON GOVERNMENT OF CANADA OBJECTIONS

PANEL

Commission Co-Chair Daniel J. Bellegarde
Commissioner Roger J. Augustine
Commissioner Elijah Harper

COUNSEL

For the Sandy Bay First Nation
Rhys Jones

For the Government of Canada
Perry Robinson

To the Indian Claims Commission
David E. Osborn, QC / Chris Angeconeb

JUNE 28, 1999

BACKGROUND

Further to correspondence from Canada objecting to the Commission's continued jurisdiction in the above-noted matter by letters dated November 12, 1998, and April 12, 1999, we have had an opportunity to consider the presentations of both parties in this matter and decide as follows.

FACTS

Sandy Bay First Nation originally made a submission to the Specific Claims Branch of Indian Affairs in November of 1982. The Band's main arguments at that time were as follows: 1) there was a land shortfall at the initial survey (date of first survey) established through historical and paylist analysis; 2) there was a shortfall of land based on a multiple survey–current population approach to calculating entitlement (the Band's main argument); and 3) there should have been an exclusion of lands occupied and improved by Indians (some 92.88 acres) prior to treaty from the total reserve allotment.

Under cover of letter, dated January 3, 1985, from R.M. Connelly, Director of the Specific Claims, to Andrew Beaulieu, Band Administrator, Canada rejected the claim. Canada wrote: "Based upon the per capita land allotment promised in Treaty No. 1 ... the total entitlement figure ... would be 11,812.36 acres. The band on the other hand has received a total of 15,928.26 acres allotted pursuant to treaty, and therefor there is no outstanding treaty land entitlement." It goes on to write, "[w]ith respect to the second argument ... no evidence was supplied that indicated that the federal government employed a general policy of using current population to calculate treaty land entitlement with subsequent surveys, or a specific policy to do so in determining the treaty land entitlement of the Sandy Bay Band. If such a policy did exist it would not alter the federal government's lawful obligation to provide land to the band pursuant to the terms of the treaty. The additions of land in 1930 and 1970 therefore have been considered as lands laid aside in fulfillment of the treaty obligation." As for the third argument, Canada stated, "... there is insufficient substantial evidence to support the Band's contention that these lands should be exclusive of the lands allotted under treaty. Furthermore, the lands allotted ... are sufficient to fulfil the treaty land entitlement even if the 92.88 acres are proven to have been exclusive of and in addition to the other lands allotted in fulfillment of the treaty land obligation."

A Band Council Resolution dated April 2, 1998, from Sandy Bay First Nation requests that the Indian Claims Commission conduct an inquiry into the rejected claim. The Commissioners accepted this claim for inquiry and notice was sent to the parties by letter dated May 27, 1998.

On October 3, 1998, at a planning conference, counsel for Canada made it clear that the Band's submission, as presented, constituted a new claim. Counsel for the Band undertook to forward its submissions in writing and this was subsequently forwarded to Canada and the ICC under cover of letter dated October 27, 1998. Canada relayed its objection regarding the restatement in letters dated November 12, 1998, and April 12, 1999.

The Band's restatement basically states that, although Canada may have provided a sufficient quantum of land at the date of first survey in 1876, Canada should not receive credit for all of this land due to its poor quality. As well, the Band claims that Canada should not receive credit for additional allotments of land in the 1930s and 1970s since the land was not explicitly provided in fulfilment of the Treaty 1 obligations.

ISSUE

The Orders in Council establishing this Commission provide as follows:

> and we do hereby advise that our Commissioners on the basis of Canada's Specific Claims Policy ... by considering only those matters at issue when the dispute was initially submitted to the Commission, inquire into and report on:
>
> (a) whether a claimant has a valid claim for negotiation under the Policy where that claim has already been rejected by the Minister[1]

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[1] Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991 (Consolidated Terms of Reference).

The Policy, ***Outstanding Business***, outlines what is required from a claimant:

> 1) Presentation of the Claim
>
> Specific claims are presented by Indian bands to the Minister of Indian Affairs and Northern Development, acting on behalf of the Government of Canada. Because they often raise complex issues, claim presentations should include a clear, concise statement of what is being claimed, a comprehensive historical and factual background, and a statement of the grounds upon which the claim is based....
>
> 2) Review of Claims by the Office of Native Claims (ONC)
>
> The Office of Native Claims undertakes a review of the claim at the direction of the Minister of Indian Affairs and Northern Development. In conducting its review, ONC analyses the historical facts presented in the claim and arranges for additional research if required. It also investigates the sequence of historical events surrounding the issues raised in the claim....
>
> All pertinent facts and documents are then referred by ONC to the Department of Justice for advice on the federal government's lawful obligation....
>
> ...
>
> 5) Further Review of the Claim
>
> A claim which has not been accepted for negotiation may be presented again at a later date for further review, should new evidence be located or additional legal arguments produced which may throw a different light on the claim.[2]

The issue is whether or not this is a "substantially new claim," and if so, whether or not this affects the ICC's jurisdiction to continue hearing this claim.

Canada's objection is based on the view that this restated claim "... represents an unequivocal departure from the claim as originally presented ..." and that it has not yet been rejected by Canada. Canada further asserts that the submission be redirected to the Policy and Research Directorate of DIAND for assessment under the Claims Policy.

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[2] Department of Indian Affairs and Northern Development (DIAND), ***Outstanding Business: A Native Claims Policy – Specific Claims*** (Ottawa: Minister of Supply and Services, 1982), 23–5; reprinted in (1994), 1 ICCP 171.

RULING

We have read the materials submitted by the parties and appreciate the very able arguments of counsel.

The submission of the restatement initially arose because "the band was asked to restate its claim for the benefit of the Commission and the government of Canada. This was because the original claim submission appears to have been made without the benefit of legal advice." The First Nation had previously submitted its claim through researchers from Treaty and Aboriginal Rights Research Centre (TARR). The First Nation has only now taken advantage of its ability to retain and instruct legal counsel in pursuit of its claim and, in doing so, has found (and conceded) that much of its submission has had to be changed. It can't be disputed that the competent presentation of a specific land claim will normally require the expertise of a lawyer, particularly if issues are complex or involve questions of law. The First Nation cannot be faulted for seeking out the best possible representation in pursuit of its specific claim. We also note that, at the very minimum, the Band has been consistent in its claim that the Band's lawful entitlement to reserve lands under Treaty 1 was never fulfilled.

Canada refers to the Claims Policy and notes that the "issues raised in the claim" are central to any claim assessment and that the Commission's own Order in Council states that it is only to consider "those matters at issue when the dispute was initially submitted...." Canada also argues that if the commission accepts "the theory of the claims process and the ICC mandate that flows from the ... Band Submission [restatement] ... [that the result is] inconsistent with both the spirit, and the four cornered literal reading, of the Claims Policy..." However, Mr Robinson also concedes, "... it is difficult to set out precise criteria that would demarcate the exact point at which a previously submitted claim and rejected claim is so materially changed that it can properly be characterized as a 'new' claim that should be resubmitted to Canada for review." In any case, we have, in past rulings, tended to view our mandate in a very broad manner. In the La̲x Kw'a̲laams report we stated: "On an ordinary reading of our Orders in Council, we have concluded that the Commission's mandate is remedial in nature and that it has a broad mandate to conduct inquiries into a wide range of issues which arise out of the application of Canada's Specific Claims Policy. In our view, this Commission was created to assist parties in the negotiation of specific claims. This interpretation is supported by a statement by Minister Tom Siddon, as he then was, in which he suggested that the Commission's mandate is not strictly limited to the four corners of the Specific Claims Policy."[3] That our mandate is remedial in nature is absolutely clear.

We note Canada's submission that, if we accept Mr Jones's account of the claims process, it would lead to results that were not contemplated by the policy and ICC mandate. As an illustration of the point, Canada writes:

> 1. A Band alleges a breach of fiduciary duty in relation to, say, a surrender of reserve land in 1940.
> 2. In a one page claim presentation, the band asserts that Canada owes the Band a lawful obligation on the basis that the Band did not receive the $5000 as specified in the surrender documents.
> 3. In reviewing the claim, Canada investigates the sequence of historical events surrounding the issues raised in the claim and confirms that the band did receive the $5000.
> 4. Consequently, Canada rejects the claim.
> 5. If Mr. Jones position accurately reflects Canada's obligations and the ICC role, then the band would be allowed to request that the ICC commence an Inquiry to determine whether Canada owes an outstanding lawful obligation to the band in relation to the 1940 surrender.
> 6. On Mr. Jones account of the claims policy and the ICC mandate, the band could then raise a variety of issues related to the surrender such as lack of informed consent, fraud, exploitative transaction, undue influence etc. In other words, issues that were never raised by the band in its original submission.

Canada then goes on to outline the view that a First Nation might, as a strategy, line jump or completely circumvent the claims process in this manner. The view of the Commission is that each claim must be reviewed in its own unique circumstances. In this case, 17 years have passed since Sandy Bay first presented this claim to Canada and a proper review by legal counsel has necessitated a change in arguments. We can see no evidence to suggest that the Band is acting in bad faith, other than to have its claim finally dealt with.

Consequently, we are ruling against Canada's objection. In the interest of fairness, Sandy Bay will not be required to re-submit its claim to the Specific Claims Branch of the Department of Indian Affairs. The Commission will continue to retain its jurisdiction in this matter and Canada will be given a reasonable amount of time to consider any new matters contained in the restatement of the Sandy Bay First Nation.

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[3] ICC, *Lax Kw'alaams Indian Band Inquiry* (Ottawa, June 1994), reported (1995) 3 ICCP 99 at 158.

FOR THE INDIAN CLAIMS COMMISSION

Daniel J. Bellegarde Commission Co-Chair	Roger J. Augustine Commissioner	Elijah Harper Commissioner

Dated this 28th day of june, 1999.

INDIAN CLAIMS COMMISSION

INTERIM RULING: ALEXIS FIRST NATION INQUIRY TRANSALTA UTILITIES RIGHTS OF WAY CLAIM

RULING ON GOVERNMENT OF CANADA OBJECTIONS

PANEL

Commission Co-Chair Daniel J. Bellegarde
Commissioner Elijah Harper
Commissioner Sheila G. Purdy

COUNSEL

For the Alexis First Nation
Jerome N. Slavik

For the Government of Canada
Robert Winogron

To the Indian Claims Commission
David E. Osborn, QC / Kathleen N. Lickers

APRIL 27, 2000

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BACKGROUND

This preliminary ruling is in relation to a specific claim filed in October 1995 by the Alexis First Nation (Alexis), in which it is alleged that Canada owes a lawful obligation to the First Nation in respect of three easements over reserve land. Commencing in 1959, these easements were granted to Calgary Power (now Transalta Utilities) to build transmission lines. The Indian Claims Commission (ICC) is ruling on an objection by Canada to the ICC's jurisdiction to accept this claim for an inquiry on the basis that it is not a "rejected" claim.

Since Alexis filed its specific claim, the First Nation's counsel, Jerome Slavik, has requested on several occasions that the ICC accept the claim for review on the basis that it has, in fact, been rejected by Canada. The First Nation alleges that repeated delays in the process of considering the claim within the Department of Indian and Northern Affairs (DIAND) and the Department of Justice constitute a rejection of the claim.[1]

Mr Slavik first requested that the ICC accept the claim for review in a letter dated August 21, 1997, after receiving information that there would be a further "delay of an undetermined amount of time" within the Department of Justice in preparing its legal opinion. Further written requests to the ICC were made on November 4, 1998, February 5, 1999, July 16, 1999, and October 18, 1999. After having received documentation from Alexis, Canada's written objection to the ICC's jurisdiction to review this claim, and further correspondence from both parties, the Commissioners accepted the First Nation's request for an inquiry on October 21, 1999. It is this decision that Canada now objects to as being premature, on the basis that the claim has not been expressly rejected by Canada.

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[1] It is the Commission's understanding that once a claim is submitted to Specific Claims, it is reviewed by DIAND which prepares a "draft historical report" for comment by the First Nation. Once acceptable to the First Nation, the historical report and claim submission are forwarded to the Department of Justice for an opinion. Once DOJ has rendered its opinion, the claim is considered by the Claims Advisory Committee.

Canada did not make formal submissions to the ICC in support of its challenge to the jurisdiction of the Commission to inquire into the Alexis claim. It did, however, set out its position in a letter dated February 7, 2000, from Robert Winogron, Counsel, DIAND Legal Services, to Kathleen Lickers, Senior Legal Counsel, ICC. Both this and the letter of March 1, 1999, from Richard Wex, Senior Counsel, Department of Justice, to David Osborn, Commission Counsel, ICC, represent Canada's submissions.

Counsel for Alexis, Mr Slavik, responded in writing to Canada's February 7, 2000, letter on February 14, 2000, to which he attached his letter of April 22, 1999, to Mr Wex and his letter of January 6, 1998, to Anne Marie Robinson, Director of Policy, DIAND. The panel considered these three letters as representing Mr Slavik's submissions.

The Commission prepared, by mutual agreement of the parties, a document brief of all relevant correspondence and previous mandate rulings of the Commission. The parties accepted this brief without supplementing it with legal argument.

THE FACTS

The panel has reviewed all the material submitted to it in the document brief prepared by the Commission. The following represents the most important facts in the chronology of this claim:

1995

1 On October 4, 1995, the Alexis First Nation commenced a claim pursuant to the Specific Claims Policy of DIAND. The claim alleges that Alexis did not receive any rent, taxes, or other benefit from a transmission line constructed on the reserve pursuant to easements granted to Calgary Power (now Transalta Utilities) beginning in 1959.

1996

2 On April 23, 1996, Mr Slavik wrote a letter to Al Gross, Federal Negotiator, Specific Claims West, DIAND, in which he cited the Supreme Court of Canada's decision in the *Apsassin* case (*Blueberry River Indian Band*[2] to support the First Nation's claim that DIAND breached its fiduciary obligation to the First Nation by failing to obtain a reasonable fee, rental, or charge from the utility for the easement.

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[2] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344.

3 Shortly thereafter, Specific Claims West completed its preliminary historical report, forwarded it to Alexis, and received a response from Mr Slavik on August 11, 1996. He repeated an earlier request that the claim be fast-tracked through the process.

4 By letter dated October 15, 1996, to Michel Roy, Director General, Specific Claims Branch, DIAND, Mr Slavik summarized his client's view that the Specific Claims historical report was inaccurate and misleading, and asked DIAND to reconsider an earlier decision not to fund Alexis and to review and respond to the report. On December 9, 1996, the funding request was turned down by the Research Funding Division of DIAND. The same letter indicated that the claim had been submitted to the Department of Justice on October 17, 1996, for review.

5 On December 13, 1996, Pamela Keating, Research Manager, Specific Claims Branch, DIAND, wrote to Mr Slavik indicating that DIAND "expects to receive a preliminary legal opinion from the Department of Justice by the end of April, 1997," after which the government would need some time to determine its preliminary position on the claim.

1997

6 In response to a further enquiry by Mr Slavik, Mr Roy reported to the First Nation on June 18, 1997, that the department now anticipated "receiving the draft preliminary legal opinion toward the end of June 1997."

7 On August 21, 1997, Mr Slavik wrote to the Indian Claims Commission indicating that, based on information obtained from DIAND, there would be a "delay of an undetermined amount of time" in processing the Alexis claim. He requested that the ICC "deem the Department of Indian Affairs to have rejected our client's claim" and to proceed with a planning conference.

8 On September 19, 1997, Ms Keating again wrote to Mr Slavik, indicating that "it could take another two to three months before we are able to provide you and your clients with Canada's preliminary position on the claim."

9 On December 23, 1997, rather than providing Canada's preliminary position on the claim, the Department of Justice recommended that additional research be conducted. According to Canada, the First

Nation agreed to the research, and DIAND contracted with Public History Inc. to undertake and complete the research by June 15, 1998.

1998

10 On January 6, 1998, Mr Slavik wrote to Ms Robinson. In addition to requesting the status of the claim in the validation process and that it be fast-tracked, he informed DIAND that he would be commencing litigation on this file on behalf of his client. Of particular note is the following statement: *"If at any point the claim is validated during the specific claims process, we will of course, suspend the litigation."* [Emphasis added.]

11 On June 10, 1998, six months later, Alexis filed its Statement of Claim in the Federal Court of Canada, Trial Division.

12 On November 4, 1998, Mr Slavik again requested in writing that the ICC undertake an inquiry into his client's claim.

1999

13 On February 5, 1999, Mr Slavik provided the ICC with documentation regarding the Alexis claim and repeated his request that the ICC accept the claim for inquiry.

14 On March 1, 1999, Mr Wex advised the ICC in writing that,

> Canada was actively addressing this claim when the First Nation chose to pursue its claim before the courts, at which time Canada stopped treating the matter as a specific claim under the Specific Claims Policy.
>
> This decision was entirely consistent with DIAND's "litigate or negotiate" policy. For resource and other reasons, Canada will not simultaneously address claims under one of its claims resolution policies, when a First Nation *actively pursues its claim in the courts*. [Emphasis added.]

15 In the same letter, Mr Wex advised the ICC that the research project had been nearing completion when Canada was informed in July 1998 that the First Nation had commenced litigation. The letter also indicated that there were subsequent discussions between Canada and Mr Slavik and that Mr Slavik had agreed to place the litigation in abeyance so that Canada could complete its research.

16 The litigation was placed in abeyance by order of the Federal Court on March 10, 1999.

17 On June 14, 1999, Mr Wex wrote to Mr Slavik and to Mr Osborn, indicating that the Specific Claims Branch had resumed work on the claim and expected to be able to provide the research report and documents to Alexis by the end of June 1999.

18 By mid-July, Alexis had not received the research report. Mr Slavik wrote to the ICC on July 16, 1999, requesting that the ICC now deem that the claim has been rejected by Canada and proceed with an inquiry.

19 Cindy Calvert, Senior Analyst, Prairie Claims, Specific Claims Branch, DIAND, wrote to the ICC on July 30, 1999, explaining that, "due to resourcing constraints," the review of the material had not been completed but that it was hoped that the First Nation would receive it "in the next month or so."

20 On October 18, 1999, Mr Slavik reported to the ICC that he had been informed by Ms Calvert that the claim was still in research but that she gave no time frame for its completion. Again, the ICC was asked to intervene.

21 On October 27, 1999, the Commissioners reviewed and accepted the First Nation's request for an inquiry.

22 On November 19, 1999, Ms Calvert informed Mr Slavik that the draft research report and supporting documentation would be sent to Alexis by December 3, 1999, and that further revisions would follow within the next two months.

2000

23 By letter to the ICC dated January 4, 2000, Paul Girard, Director General, Specific Claims Branch, DIAND, indicated that Alexis had received the research report, and that following the First Nation's review, the materials would be sent to the Department of Justice for a further review, after which Canada would be in a position to provide the First Nation with its preliminary position on the claim.

24 By letter dated February 7, 2000, from Mr Winogron to the ICC, Canada challenged the jurisdiction of the ICC to inquire into the Alexis claim, on the basis that the claim had not yet been rejected by Canada.

THE ISSUES

1 Do the words "already rejected by the Minister" include circumstances in which Canada's conduct is tantamount to a rejection?

If the answer to Issue 1 is yes, Issue 2 must be considered.

2 On the facts of the Alexis First Nation's claim, was Canada's conduct tantamount to a rejection, thereby giving the Commission the authority to review the claim?

RULING

ISSUE 1

Do the words "already rejected by the Minister" include circumstances in which Canada's conduct is tantamount to a rejection?

Canada argues in its letter of February 7, 2000, that the ICC lacks jurisdiction to proceed with an inquiry because the claim has not yet been rejected by the Minister. Canada points to the "empowering legislation" that enables the Commission to inquire into and report on only those claims that have been rejected by the Minister.

Counsel for Alexis argues that a rejection is not confined to a formal dismissal of the claim but can also be the outcome of the Crown's conduct, a sequence of events, or other circumstances. In support of the contention that the ICC has the jurisdiction to determine that a claim has been rejected where there is no express communication to that effect, Mr Slavik asks the panel to refer to previous decisions of the ICC dealing with its jurisdiction to review such claims.

The mandate of the Commission is contained in Order in Council PC 1992-1730, July 27, 1992, which states, among other things, that the Commissioners shall:

> inquire into and report on:
>
> (a) whether a claimant has a valid claim for negotiation under the Policy *where that claim has already been rejected by the Minister*;
> [Emphasis added.]

The panel also reviewed four rulings by the ICC in which its jurisdiction to accept a claim had been challenged by Canada. For ease of reference, these rulings are attached as Appendices:

A. *Interim Ruling: Athabaska Denesuline Treaty Harvesting Rights Inquiry: Ruling on Government of Canada Objections*, May 7, 1993, in [1994] 1 ICCP 159.[3]

B. "La Ronge Candle Lake and School Lands Claims", May 9, 1995, by letter from Robert F. Reid, Legal and Mediation Advisor; ICC file 2107-04-01,02,03.[4]

C. "Mikisew Cree First Nation [Treaty Entitlement to Economic Benefits]", in *Inquiry into the Claim of the Mikisew Cree First Nation*, (1998) 6 ICCP 183 at 209.[5]

D. "Sandy Bay First Nation Inquiry, Treaty Land Entitlement Claim: Ruling on Mandate Challenge," by letter dated June 28, 1999, from Commissioners Bellegarde, Augustine, and Harper, ICC file 2106-10-01.[6]

The Athabaska Denesuline ruling concerned the question of whether a claim that had not gone through the specific claims process could nevertheless be a "rejected" claim. Canada argued that the Order in Council creating the Indian Claims Commission prevented it from inquiring into a claim unless it had been expressly rejected by the Minister. The panel found, however, that there was "nothing in those terms of reference that confines the Commission to claims rejected in a particular way."[7] In this case, the panel determined that a refusal by the funding arm of DIAND to fund the Athabaska Denesuline effectively prevented the First Nation from going through the specific claims process in the first place, thereby constituting a rejection of its claim.

The La Ronge mandate challenge also dealt with the interpretation of the words "rejected by the Minister." The First Nation's Candle Lake and School Lands claims, together with a treaty land entitlement (TLE) claim, originally proceeded by way of litigation rather than through the specific claims process. Six years after the litigation began, a senior official at DIAND wrote to the Lac La Ronge Band in respect of negotiations on the TLE litigation, adding that "the Department of Indian Affairs is convinced that the lands at Candle Lake and the 'school lands' never became reserves and that a court would concur."[8] Canada argued before the ICC that this letter did not constitute a rejection of the Candle Lake and School Lands claims because a rejection must be in relation to a claim submitted under the Specific Claims Policy. The First Nation argued that it had already given Canada all the relevant information and argument supporting the claims within the litigation, and that the letter amounted in form if not in substance to a rejection of these claims. The panel agreed with the First Nation and also observed that Canada had raised no objection to the Commission's inquiring into the TLE claim, notwithstanding that it too had never been formally put through the specific claims process.

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[3] See above at 3.

[4] See "Interim Ruling: Lac La Ronge Indian Band Inquiries, Candle Lake and School Lands Claims," above at 13.

[5] See "Interim Ruling: Mikisew Cree Nation Inquiry, Treaty Entitlement to Economic Benefits Claim," above at 23.

[6] See "Interim Ruling: Sandy Bay First Nation Inquiry, Treaty Land Entitlement Claim," above at 39.

[7] ICC, *Interim Ruling: Athabaska Denesuline Treaty Harvesting Rights Inquiry: Ruling on Government of Canada Objection* (Ottawa, May 7, 1994), reported [1994] 1 ICCP 159 at 163, see above at 7.

In Mikisew Cree First Nation, a ruling dealing with an allegation of unreasonable delay, Canada challenged the mandate of the Commission to accept the claim for review before Canada had expressly rejected it. Canada argued that there must be a rejection of the claim on its merits before the Commission can proceed with an inquiry and that, notwithstanding a preliminary review that did not disclose an outstanding lawful obligation by Canada to the Mikisew Cree, no final decision had been made.

The First Nation argued that the Commission, as an administrative body, has the requisite authority to make decisions with respect to its jurisdiction, subject to judicial review of such decisions. As such, the First Nation argued, it falls to the Commission to determine in each case what constitutes a "rejection." A rejection, according to the First Nation, may be expressed in writing or orally or may be "based on the action, inaction, or other conduct, such as the refusal or inability to make a decision of the Crown within a reasonable period of time ..."[9] The panel found on the facts that the delay by Canada in deciding whether to accept the claim was tantamount to a rejection and that the panel therefore had the authority to proceed with an inquiry.

Finally, the Sandy Bay First Nation ruling dealt with the question of the Commission's jurisdiction to hear a claim that, in Canada's view, was a significant departure from the original claim and had not been processed through the specific claims process or rejected. Although Sandy Bay and the Alexis claims differ on the grounds for alleging that Canada has rejected the claim, we note with approval the reference to the discussion of the Commission's mandate in *Lax Kw'alaams Indian Band Inquiry*.[10] The panel there noted that in past rulings the Commission has tended to view its mandate in a very broad manner, that the "mandate is remedial in nature and that [the Commission] has a broad mandate to conduct inquiries into a wide range of issues which arise out of the application of Canada's Specific Claims Policy."[11]

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[8] Quoted in "Interim Ruling: Lac La Ronge Indian Band Inquiries, Candle Lake and School Lands Claims," see above at 18.

[9] ICC, "Interim Ruling: Mikisew Cree First Nation Inquiry, Treaty Entitlement to Economic Benefits Claim," reported (1998) 6 ICCP 183 at 213; see above at 29.

In each of these four ICC rulings a First Nation has asked the ICC to review a claim that has not been expressly rejected as contemplated by the process set out in Canada's Specific Claims Policy as published in 1982 in *Outstanding Business*.[12] In all four cases the Commission concurred with the First Nations' arguments that the Commission had the jurisdiction to review the claim because there had been, as a result of Canada's conduct or other circumstances, a rejection.

We agree with the Athabaska Denesuline ruling that the Order in Council establishing the Commission's mandate does not set out how a claim is "rejected." Further, we agree with the argument expressed by counsel for Mikisew Cree that a "rejection" should not be confined to an express communication, either written or verbal, but can be the result of certain action, inaction, or other conduct. To restrict the mandate of the Commission to a narrow and literal reading of the Specific Claims Policy would prevent First Nations in certain circumstances from having their claims dealt with fairly and efficiently.

Finally, we are mindful of previous rulings, in particular Sandy Bay First Nation,[13] in which Commissioners have confirmed their interpretation of their mandate as being remedial in nature. In our view, it is incumbent on all participants in the specific claims process to ensure that Canada's final resolution is arrived at without subjecting the First Nation to a myriad of delays. We remain cognizant of the fact that this process was designed to speed up the resolution of specific claims and to provide the parties with an alternative to expensive and protracted litigation. As such, the process is required to meet the test of expediency and cost savings. It could not have been the intent of Parliament when it designed the mandate of the Commission to prevent a First Nation from utilizing the ICC in circumstances where Canada has not made a decision on acceptance or rejection within a reasonable time. The ability to intervene in these circumstances is wholly consistent with the remedial nature of the Commission's mandate.

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[10] ICC, *Inquiry into the Claim of the Lax Kw'alaams Indian Band* (Ottawa, June 29, 1994), reported [1995] 3 ICCP 99 at 158, quoted in "Interim Ruling: Sandy Bay First Nation Inquiry, Treaty Land Entitlement Claim," see above at 44-45.

[11] ICC, *Inquiry into the Claim of the Lax Kw'alaams Indian Band* (Ottawa, June 29, 1994), reported [1995] 3 ICCP 99 at 158, quoted in "Interim Ruling: Sandy Bay First Nation Inquiry, Treaty Land Entitlement Claim," see above at 44.

[12] See DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 23 ff.

[13] ICC, *Inquiry into the Claim of the Lax Kw'alaams Indian Band* (Ottawa, June 29, 1994), reported [1995] 3 ICCP 99 at 158, quoted in "Interim Ruling: Sandy Bay First Nation Inquiry, Treaty Land Entitlement Claim," see above at 45.

The panel confirms the Commission's findings in previous rulings that it has the mandate to make decisions regarding its jurisdiction to review claims. Further, the panel concludes that a claim may be rejected by Canada in more than one way: by an express communication to the First Nation; by the action, inaction, or other conduct of Canada; or in other circumstances where it is unnecessary and would be unfair to compel the First Nation to fit its claim into the strict confines of the Specific Claims Policy.

ISSUE 2

On the facts of the Alexis First Nation's claim, was Canada's conduct tantamount to a rejection, thereby giving the Commission the authority to review the claim?

Where there has been no formal communication of a rejection of the claim, as in this case, it remains to consider whether the action, lack of action, or other conduct of the Crown is sufficient to conclude that the claim has been rejected. Whether the Commission is correct in accepting a request for an inquiry in these circumstances will depend on the facts of each case.

From October 1995, when the Alexis claim was filed with DIAND, until the end of 1996, this claim appeared to be progressing relatively smoothly. The preliminary historical report prepared by Specific Claims West was completed in April 1996 and reviewed by the First Nation by August of that year. Where the process began to break down, however, was in the referral of the claim to the Department of Justice in October 1996 for a preliminary legal opinion. Counsel for Alexis was informed that it would take first four and then six months to complete the legal analysis, after which DIAND would need an unspecified amount of time to formulate its preliminary position. By the end of 1997, the First Nation had still not received DIAND's preliminary position.

It should be added here that, in the early days of this claim, counsel for Alexis asked DIAND in writing on four separate occasions if this claim could be fast-tracked on the basis that it was straightforward and represented an amount less than $500,000. It is clear from the correspondence that Mr Slavik believed that there was in place a fast-track process for simple, less costly claims and that his client's transmission line claim fit this category. Yet, there is no evidence before the panel to indicate that DIAND responded to his repeated requests or even advised him whether such a fast-track process existed.

Instead of providing the government's preliminary position by the end of 1997, DIAND, on the recommendation of the Department of Justice, requested that further historical research be conducted. It is perhaps telling that Mr Slavik had complained about the first research report in mid-1996. The second report was to be completed by June 1998 and, according to DIAND's letter of March 1, 1999, to the ICC, the research was "nearing completion" in July 1998. The entire process, however, was then put on hold because the government learned that the Alexis First Nation had commenced litigation of its claim in the Federal Court.

The panel concludes that from October 1995 until July 1998, a period of close to three years, the First Nation was led to believe that a preliminary position would be forthcoming. Further, the panel finds that there is nothing in the materials filed by Canada that would suggest that this claim is unduly complicated or potentially costly, factors that could justify the significant delays up to that point. When Alexis agreed to further research at the end of 1997, it was with the understanding that it would be completed and shared with the First Nation by June 1998. This did not happen. The First Nation received neither the research report nor DIAND's long-awaited preliminary position, or any indication when it or a final position would be forthcoming. In the circumstances, we conclude that, even if the parties had agreed that the additional research was necessary, the delay by the Department of Justice in recommending that such research was required was unreasonable.

Unfortunately, instead of the process picking up speed in July 1998, it ground to an immediate halt when DIAND learned of the litigation. From then until June 1999, almost one year later, no work was done on the claim. This further delay deserves a closer look, as Canada submits that it was caused by the First Nation's actions.

On January 6, 1998, counsel for Alexis wrote to DIAND advising that the First Nation would be commencing litigation. The letter also stated: "If at any point the claim is validated during the specific claims process, we will of course, suspend the litigation." It is clear that the First Nation was under the belief that the litigation and the claims process could coexist without jeopardizing either one. In his letter to Mr Wex on April 22, 1999, Mr Slavik indicated that the litigation had been commenced to preserve his client's rights and that DIAND was informed shortly afterward that the First Nation "did not intend to proceed with this Statement of Claim in Court providing DIAND expeditiously proceeded with the claims."

It is uncertain when Mr Slavik became aware that all work had stopped on his client's claim; it is clear from the record, however, that DIAND did not respond in writing to Mr Slavik's January 6, 1998, letter to advise him of DIAND's policy, which was to stop treating a matter as a specific claim once litigation started. Given that this policy is not contained in *Outstanding Business* or publicized widely, if at all, it was incumbent on DIAND to advise the First Nation in writing that it was suspending all work on its claim. The panel has no evidence before it that Canada made any efforts either to ensure that the First Nation was aware of the consequences of Canada's decision, or to find a resolution to the problem that Alexis now faced, other than to require that the litigation be placed in abeyance.

Moreover, there is no reason for the panel to question the First Nation's decision to commence litigation in order to preserve its rights. Alexis had received no indication from DIAND that there was any reasonable prospect of a negotiated settlement in the near future. Although the panel agrees that Canada, where possible, should not be required to expend significant resources on two fronts – specific claims and the courts – in respect of the same claim, this situation was not the case here. The uncontroverted evidence of the First Nation is that it informed DIAND soon after the action was commenced that it would not pursue the action, including demanding a Statement of Defence, if its specific claim could proceed expeditiously. Further, Canada's letter of March 1, 1999, appears to confirm that its "litigate or negotiate" policy is designed to deal with a First Nation that "actively pursues its claim in the courts." The panel finds that DIAND's conduct in failing to properly advise Alexis of the consequences of commencing litigation and in failing to adapt its policy in order to permit the claims process to proceed while respecting the legal rights of the First Nation was the primary cause of the further one-year delay.

Alexis put its litigation into abeyance in March 1999 on the representation by Specific Claims that there would be a prompt response to its claim. DIAND and the Department of Justice resumed work on the claim, undertaking to provide the research and other materials to Alexis by the end of June. DIAND missed this deadline, which was then changed to July. According to a letter dated October 15, 1999, from Mr Slavik to the ICC, the research had still not been conveyed to the First Nation for review and no date for completion of the research had been given. It should be noted here that, once the First Nation received and commented on the second research report, the report and comments would be reviewed a second time by Justice, following which DIAND's preliminary position would be articulated to the First Nation. No estimated time frame for the conclusion of this process was conveyed to Alexis. Finally, in early December 1999, DIAND sent a draft research report to the First Nation with an indication that further revisions would be provided within the next two months. By then, over four years had passed from the filing of the claim.

The panel accepts Canada's explanation in its letter of July 30, 1999, from Ms Calvert to Mr Osborn that, contrary to Mr Slavik's statement in his letter of July 16, it would not take a further 18 to 24 months for the Department of Justice to render its legal opinion to DIAND, as the initial submission and historical report had already been reviewed by legal counsel. Ms Calvert's statement, however, that in general it takes approximately 30 months to complete the legal opinion on a claim is a startling admission, given that the opinion is only one part of the process preceding a decision on validation. This information supports the panel's finding that much of the delay was the result of the Department of Justice's review process.

The ICC ruling in Mikesew Cree First Nation, in which the Commission found that Canada's delay in rendering a decision on validation was tantamount to a rejection, is instructive on the principles that the ICC should apply in this mandate challenge. In that ruling, the panel referred to three cases[14] that set out the factors in determining whether a decision-maker has had a reasonable period of time to make a decision. In summary, the courts have held that what constitutes a reasonable time for a decision depends on the complexity of the issues, the circumstances of each case, and the possible prejudice to either party.

Can the delay in this instance be justified by the complexity of the claim? The Alexis claim alleges a breach of the statutory and fiduciary obligation by the Crown in its advice to the First Nation and in its negotiations with Calgary Power (now Transalta Utilities) to permit a series of easements over reserve land. The claim alleges that, as a result of the Crown's agreement with the utility, the First Nation received no annual payments for use of the easements and therefore lost significant revenues. The parties have not yet agreed upon the issues to be determined by the ICC nor has the Commission had the benefit of reviewing the second research report; nevertheless, it is apparent that the facts and issues in this claim will be relatively straightforward.

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[14] *Re Friends of Oldman River Society* (1993), 105 DLR (4th) 444 (FCTD); *R. v. Stapleton* (1983), 6 DLR (4th) 191 (NSCA); and *Re Delmas and Vancouver Stock Exchange* (1994), 119 DLR (4th) 136 (BCSC), discussed at page 6 of the ruling.

The panel concludes that, after more than four years, Canada has had sufficient time to determine whether it breached its lawful obligation to Alexis by failing to require the utility to pay an annual charge or rent. In particular, the panel finds that the time taken to complete the legal analysis, after which the First Nation was told only that further research was necessary, cannot be justified in a claim of this magnitude. Compounding this initial delay was the further delay caused by DIAND's policy to suspend all work when Alexis commenced litigation. Even though the research report is now complete and in the hands of the First Nation, Canada has not indicated any timetable for its decision once it has the First Nation's comments. In the circumstances, such a timetable is the least that the claimant should be able to expect.

The panel has also considered whether Canada would be prejudiced by a ruling permitting the ICC to review the claim as a "rejected" claim. In the first place, Alexis has put its litigation in abeyance at the request of Canada. Secondly, the final research report is now complete, subject to further modifications and comment by the First Nation. It is difficult to identify any prejudice to Canada at this time. On the contrary, the Commission's process of consolidating the historical documents and bringing the parties together in a planning conference to discuss the issues and evidence could assist Canada in finalizing its position. Finally, Canada retains the ability to reject the Commission's recommendations. This fact alone negates any ultimate prejudice to Canada by having the ICC review this claim. That being said, the Commission will consider any requests by Canada if it requires additional time to prepare for the ICC process.

Would there be prejudice to the First Nation if the ICC were not to assume jurisdiction over this claim? The litigation has now been in abeyance for more than one year. There is an undetermined time before the First Nation will know if its claim, now four and a half years old, has been accepted or rejected by DIAND. In our view, the longer that Alexis has to wait to advance its claim in either forum, the greater the potential of prejudice to the First Nation in being able to marshal the necessary evidence, in particular witnesses. In addition, although the panel has no information on the costs to

Alexis of pursuing its claim, it is reasonable to assume that those costs will escalate the longer it waits for a decision from DIAND.

Although the panel does not have evidence before it that Alexis has suffered any prejudice to date, to permit this situation to continue would be grossly unfair to the First Nation. Alexis entered the claims process in good faith, in accordance with the principles, as enunciated in *Outstanding Business,* that there would be a fair, equitable, and expeditious resolution of its claim. This has not been the result, nor has the litigation progressed past the filing of a Statement of Claim almost two years ago. Further, given the monetary value of the claim, Alexis could well find that the cost of seeking redress over such a long period outweighs any compensation found to be owing. Even if the First Nation cannot at this time point to any tangible prejudice, we are prepared to conclude that, on balance, there is a likelihood of prejudice to its ability to resolve its claim should it remain any longer in the specific claims process.

For the reasons cited above, the panel finds that, on the facts of this case, the cumulative effect of several delays on the part of the Crown is tantamount to a rejection of the claim. There is no evidence that the delays could be justified by complexities in the case. Further, there is no evidence of prejudice to Canada by this finding, whereas there is a likelihood of prejudice to Alexis if the ICC does not intervene.

CONCLUSION

The response to Issue 1 is: Yes, a "rejection" can include certain circumstances in which Canada's conduct is tantamount to a rejection. The response to Issue 2 is: Yes, on the facts of this case, the delays by Canada were tantamount to a rejection. The Commission therefore retains its jurisdiction to review the claim. The parties will submit all relevant documents to the Commission and a first planning conference will be convened as soon as possible. The Commission remains ready to assist the parties wherever possible to find a resolution to this matter.

FOR THE INDIAN CLAIMS COMMISSION

Daniel J. Bellegarde
Commission Co-Chair

Elijah Harper
Commissioner

Sheila G. Purdy
Commissioner

Dated this 27th day of April, 2000.

INDIAN CLAIMS COMMISSION

INTERIM RULING
JAMES SMITH CREE NATION
INQUIRIES
TREATY LAND ENTITLEMENT AND CUMBERLAND 100A RESERVE CLAIMS

RULING ON GOVERNMENT OF CANADA OBJECTIONS

PANEL

Commission Co-Chair P.E. James Prentice, QC
Commissioner Carole T. Corcoran
Commissioner Elijah Harper

COUNSEL

For the James Smith Cree Nation
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For the Government of Canada
Jeffrey A. Hutchinson

To the Indian Claims Commission
David E. Osborn, QC / Kathleen N. Lickers

MAY 2, 2000

BACKGROUND

The Commissioners have considered Canada's challenge to the mandate of the Commission to conduct an inquiry into aspects of the James Smith Cree Nation (JSCN) treaty land entitlement (TLE) claim and aspects of the JSCN claim concerning Peter Chapman Indian Reserve (IR) 100A.

The submissions of Mr Jeffrey Hutchinson of January 7, 2000, and March 10, 2000, and Ms Sylvie Molgat of February 25, 2000, were considered and discussed at length; the Commissioners are grateful to counsel for their cogent and exhaustive review of the matter. After due consideration, the Commissioners have decided to proceed with the inquiry, in all aspects, as requested by the JSCN. The principle of fairness was (and is) the governing factor in deciding to proceed with this inquiry. Our reasons follow.

The JSCN originally submitted three (3) claims to the Specific Claims Branch, Department of Indian Affairs. These claims relate to the validity of the surrenders of Chacastapasin IR 98 and Peter Chapman IR 100A, respectively, and the JSCN's outstanding treaty land entitlement. It is the Commission's mandate to conduct an inquiry into aspects of the Peter Chapman IR 100A and JSCN's TLE claim that are today at issue. Canada has raised no challenge to the Commission's mandate to inquire into the surrender of Chacastapasin IR 98.

THE TREATY LAND ENTITLEMENT

A claim for TLE was submitted on behalf of the JSCN in the early 1980s by the Federation of Saskatchewan Indians. Under cover of May 22, 1984, then Minister of Indian Affairs John Munro rejected JSCN's TLE, stating that the shortfall of land at the time of first survey was fulfilled as a result of the amalgamation of the James Smith and Peter Chapman Bands in 1902. Unfortunately, neither the original nor a copy of the TLE submission can today be found.

By a Band Council Resolution dated May 10, 1999, the JSCN requested that the Indian Claims Commission conduct an inquiry into the rejected TLE claim. In advance of the Commission's first planning conference, the First Nation prepared a summary document, entitled "James Smith Cree Treaty Land Entitlement: Legal Submissions." In this submission, Canada argues, the First Nation raised claims pertaining to land quality and land occupied prior to treaty, claims which Canada argues were not raised in the original submission. As such these claims are "new claims" not previously rejected by the Minister and therefore are not properly before the Commission. Canada maintains that "there is a distinction between a Band simply presenting new legal argument or relying on different evidence to prove the claim originally submitted and ... a Band submitting entirely new grounds for a claim." The TLE claims based upon land occupied prior to treaty and land quality are, Canada submits, entirely new grounds for a TLE claim.

The First Nation argues that, as a result of the original submission now being lost, neither party is in a position to show conclusively what comprised the original treaty land entitlement submission. In addition, the First Nation submits that "a First Nation's claim to TLE cannot be considered in a vacuum and it would be grossly unfair to the First Nation to employ simple arithmetic to calculate TLE while ignoring Canada's broader or other obligations under Treaty."

PETER CHAPMAN IR 100A

The First Nation also submitted a claim to the Specific Claims Branch alleging breaches by the Crown of its statutory, treaty, trust, and fiduciary obligations to the Peter Chapman Band in relation to the taking of a surrender in 1902 and the subsequent sale of those lands. This claim was partially rejected in a letter of March 13, 1998, from then Assistant Deputy Minister John Sinclair to then Chief Eddie Head, JSCN.

By a Band Council Resolution dated May 10, 1999, the First Nation requested that the Indian Claims Commission conduct an inquiry into the validity of the 1902 surrender and the propriety of the subsequent land sales.

In advance of the Commission's first planning conference, the First Nation also prepared a summary document entitled "Peter Chapman/Cumberland 100 A: Legal Submissions" which, Canada argues, raised for the first time a claim regarding unalienated mineral rights (hereinafter referred to as the "minerals issue") thereby raising a "new claim" not previously reviewed or rejected by the Minister and therefore not properly before the Commission.

The First Nation argues that, in its original submission, it made arguments that the Crown "breached its statutory, treaty, trust and fiduciary duties in the taking of a surrender and for Canada to now distinguish various sub-issues which may or may not have been considered in the rejection and characterize them as "substantively new claims" is engaging in legalistic and specious argument based on a narrow and restrictive interpretation of the Commission's mandate."

ISSUE

The Order in Council establishing this Commission provides:

> AND WE DO HEREBY advise that our Commissioners on the basis of Canada's Specific Claims Policy, ... by considering only those matters at issue when the dispute was initially submitted to the Commission, inquire into and report on:
>
> (a) whether a claimant has a valid claim for negotiation under the Policy where that claim has already been rejected by the Minister.[1]

The issue to be decided by the Commission is whether or not, by introducing issues of minerals, lands occupied prior to treaty, and land quality, the First Nation has raised "substantially new claims," and if so, whether the Commission has jurisdiction to continue its inquiry into these claims.

RULING

To begin, we note counsel for Canada's reference to the Supreme Court of Canada's decision in *U.E.S., Local 298 v. Bibeault*[2] and agree that the Commission has the authority to interpret its mandate and therefore determine its jurisdiction. The Commission views its mandate, as it has in previous rulings and most recently in the Sandy Bay First Nation Inquiry, in a broad and remedial manner and we see no reason to restrict this interpretation on the facts of this case. As we stated in the Lax Kw'alaams report, "this Commission was created to assist parties in the negotiation of specific claims."[3] We have also recently stated that "[t]o restrict the mandate of the Commission to a narrow and literal reading of the Specific Claims Policy would prevent First Nations in certain circumstances from having their claims dealt with fairly and efficiently."[4]

---

[1] Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991 (Consolidated Terms of Reference).

[2] *U.E.S., Local 298 v. Bibeault*, [1988] 2 SCR 1048.

[3] ICC, *Lax Kw'alaams Indian Band Inquiry* (Ottawa, June 1994); reported [1995] 3 ICCP 99 at 158.

By interpreting our mandate in this remedial manner we are mindful that each claim must be viewed in its own unique circumstances. In the case of the JSCN TLE claim, owing to the fact that the original submission cannot now be found, neither party is in a position to show conclusively what the original submission was comprised of and what it did, or did not, contain. Canada cannot confirm with certainty what issues were reviewed by it, save and except that which is specifically mentioned in Minister John Munro's letter of May 22, 1984. Moreover, the consequences of adopting Canada's reasoning would, we believe, result in a multiplicity of proceedings in a claim that is already very complex and could result in prolonging the final resolution while the First Nation awaits a response from Specific Claims on the questions of land quality and lands occupied prior to treaty.

In the result, we cannot accept Canada's argument that the issues surrounding lands occupied prior to treaty and the quality of those lands are "new claims." They are more properly aspects of the claim that may give rise to new legal issues, but they do not constitute new claims. In any event, we would not be able to conclude that these claims are "new" without first knowing what was originally submitted and reviewed. In the absence of knowing this, the Commission accepts the JSCN's request for a full inquiry into all aspects of what the First Nation has consistently argued to be an outstanding treaty land entitlement.

As regards the minerals issue, the First Nation admits that in its original submission and in the partial rejection of this claim "the matter of mineral rights was not specifically addressed." We also accept Canada's argument that "the Band alone has the responsibility to bring forward its own case" and that Canada is obliged to consider that case. We do not accept, however, the consequence of Canada's argument on the facts of this case. That consequence, we believe, would result in further unfairness to the First Nation.

Simply put, the First Nation requested that the Commission inquire into the validity of the 1902 surrender of Peter Chapman IR 100A and the propriety of the sale of those surrendered lands. The First Nation has framed the issues surrounding the surrender and sale of IR 100A as a breach of the Crown's statute, treaty, trust, and fiduciary duties and the First Nation presents the issue of unalienated mineral rights as further evidence of the Crown's breach of duty. In the interests of fairness, we are prepared to proceed into the inquiry of the surrender and sale of the Peter Chapman IR 100A lands, including consideration of the mineral rights. To do otherwise, we believe, would result, not in a thorough inquiry into all matters at issue, but in a piecemeal inquiry, with some aspects of the claim before the Commission and others at various stages of review within the Specific Claims Process. This, we believe, runs counter to our remedial mandate and would result in unfairness to the First Nation.

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[4] ICC, "Interim Ruling: Alexis First Nation Inquiry, Transalta Utilities Rights of Way Claim," p. 8, see above at 59.

In agreeing to inquire into all aspects of JSCN's TLE, including lands occupied prior to treaty and the quality of those lands, and the issue of mineral rights in the Peter Chapman IR 100A claim, we are mindful of the effect our decision may have on the course of this inquiry in so far as Canada may not have had an adequate opportunity to consider the issues or may need more time to prepare, or because additional research is needed (a fact already admitted by Canada as regards the population analysis of JSCN's TLE). The Commissioners are, as previously stated, "firmly of the view that they must strive to be fair to both parties, not only claimants, and will attempt to avoid any unfairness the government feels their decision to proceed with the inquiry causes."[5] We therefore invite the parties at the next planning conference to discuss a timetable that will accommodate any needs for additional research or preparation time.

FOR THE INDIAN CLAIMS COMMISSION

P.E. James Prentice, QC Commission Co-Chair	Carole T. Corcoran Commissioner	Elijah Harper Commissioner

Dated this 2nd day of May, 2000.

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[5] ICC, "Interim Ruling: Lac La Ronge Indian Band Inquiries, Candle Lake and School Lands Claims," see above at 19.

INDIAN CLAIMS COMMISSION

INTERIM RULING: KLUANE FIRST NATION INQUIRY KLUANE GAME SANCTUARY AND KLUANE NATIONAL PARK RESERVE CREATION CLAIM

RULING ON GOVERNMENT OF CANADA OBJECTIONS*

PANEL

Commission Co-Chair P.E. James Prentice, QC
Commissioner Carole T. Corcoran

COUNSEL

For the Kluane First Nation
Dave Joe

For the Government of Canada
Jeffrey A. Hutchinson / Aly Alibhai

To the Indian Claims Commission
David E. Osborn, QC / Thomas A. Gould

DECEMBER 2000

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* ICC, *Kluane First Nation, Interim Ruling: Kluane Game Sanctuary and Kluane National Park Reserve Creation* (Ottawa, December 2000).

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BACKGROUND

This preliminary ruling arises from a challenge by the Government of Canada to the jurisdiction of the Indian Claims Commission to hear a claim advanced before the Commission by the Kluane First Nation.

The claim was submitted by the First Nation to Canada on October 2, 1996, pursuant to Canada's Specific Claims Policy, outlined in the Department of Indian Affairs and Northern Development's pamphlet entitled *Outstanding Business: A Native Claims Policy*. In its claim, the First Nation alleges that the Government of Canada breached certain fiduciary obligations owed to the Kluane people at the time the Kluane Game Sanctuary and the Kluane National Park Reserve (the "Parks") were created by the governments of Yukon and Canada. The essence of the First Nation's complaint is that the creation of the Parks in the 1940s denied the First Nation and its members access to a large portion of their traditional territory, thereby adversely affecting their livelihood. The First Nation alleges that it is owed an "outstanding lawful obligation" under the Specific Claims Policy.

Canada questions whether this claim can be properly characterized as a "specific claim" and its jurisdictional objection is advanced on that basis. Indeed, as early as March 6, 1998, a representative of the Indian Affairs' Specific Claims Branch wrote to the First Nation seeking clarification on the "source" of the alleged outstanding lawful obligation.

On July 27, 1998, Chief Robert Johnson replied that the basis of the First Nation's claim was the reasoning of the Supreme Court of Canada in *Delgamuukw v. British Columbia*.[1] The First Nation's position, he pointed out, was that Canada's actions in the creation of the Parks constituted a breach of fiduciary obligation and an outstanding lawful obligation under the Specific Claims Policy since "[t]he Kluane First Nation was not consulted and did not grant their consent before their traditional hunting, fishing, and trapping lands were included" within the Parks.[2]

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[1] *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010.

Canada completed its review of this claim during the spring of 1999 and responded to the First Nation on March 25, 1999. In that response, Paul Cuillerier, the Director General of Indian Affairs' Specific Claims Branch, advised Chief Johnson that the department was not prepared to recommend acceptance of the claim for negotiation under the Specific Claims Policy:

> In our view, the lands in question do not constitute "Indian lands" within the context of the Specific Claims Policy. The Policy addresses claims relating to reserve lands governed by the *Indian Act* and specifically excludes "claims based on unextinguished native title."
>
> It is our view that the [First Nation's] claim is based on the assertion of unextinguished native or aboriginal title to the lands in the Kluane Game Reserve and the Kluane National Park Reserve. The fiduciary obligations that the [First Nation] maintains were owed by Canada to the [First Nation] relate to the protection and advancement of the [First Nation's] interests in lands to which unextinguished aboriginal title is claimed. The [First Nation's] claim does not relate to actions or omissions on the part of Canada with respect to the administration of land or assets under the *Indian Act* or the fulfilment of Indian treaties. The [First Nation's] claim does not come within the types of claims recognized under the Specific Claims Policy as giving rising [sic] to a lawful obligation.
>
> For these reasons, it is our position that the [First Nation] has not established that an outstanding lawful obligation exists on the part of Canada, within the meaning of the Specific Claims Policy, with respect to the establishment of the Kluane National Park Reserve or the Kluane Game Sanctuary.[3]

Mr Cuillerier then laid out the options available to the First Nation in the wake of Canada's rejection of the claim, including the following:

> I should also point out that *you have the option to submit a rejected claim to the Indian Claims Commission and request that the Commission hold an inquiry into the reasons for the rejection*. This letter will serve as evidence, for the purposes of the Commission that the [First Nation's] claim is not being recommended for negotiation.[4]

---

[2] Chief Bob Johnson, Kluane First Nation, to Dr John Hall, Research Manager – British Columbia and Yukon Territory, Specific Claims Branch – Vancouver, July 27, 1998.

[3] Paul Cuillerier, Director General, Specific Claims Branch, Indian and Northern Affairs Canada, to Chief Robert Johnson, Kluane First Nation, March 25, 1999, p. 2.

[4] Paul Cuillerier, Director General, Specific Claims Branch, Indian and Northern Affairs Canada, to Chief Robert Johnson, Kluane First Nation, March 25, 1999, p. 2. Emphasis added.

The First Nation first approached the Commission in the summer of 1999 and, on October 4, 1999, the First Nation forwarded a copy of its October 2, 1996, submission to the Commission with a request that the Commission convene an inquiry into the claim. At that time, Chief Johnson wrote, making reference to certain agreements the First Nation was in the process of negotiating with Yukon and Canada:

> Kluane First Nation is in the process of completing its Final and Self-Government Agreements and the only remaining issues are financial compensation and these outstanding Specific Claims. The "certainty" clauses of our Final Agreement would vitiate these Specific Claims and my First Nation citizens are adamant that these issues must be dealt with prior to ratification of these agreements.[5]

The Commission reviewed and accepted the First Nation's request for an inquiry on October 27, 1999, and, with the objective of proceeding to a hearing, the Commission scheduled a planning conference for February 11, 2000. However, on January 28, 2000, Jeffrey Hutchinson, counsel for Canada, advised the Commission of his intention to challenge the Commission's jurisdiction to proceed:

> After having reviewed the submissions of the Kluane First Nation, we wish to confirm our view that every aspect of the claim is premised on the First Nation's claim of unextinguished aboriginal title to land. As you are aware, the Outstanding Business Policy explicitly states that claims based "on traditional Native use and occupancy of land" are designated as comprehensive claims. It is our reading of the policy that comprehensive claims are to be dealt with by means other than the Outstanding Business Policy. We are, of course, reinforced in this view by the guideline found in Part Three of the Policy which states, "Claims based on unextinguished native title shall not be dealt with under the specific claims policy."
>
> We are advised that Kluane First Nation has been involved in extensive comprehensive claim negotiations with Canada and the Government of Yukon. We are also advised that Kluane First Nation was advised some time ago of Canada's position expressed above.
>
> In light of the foregoing, we are not at present in a position to set out or address the issues raised by the claim. We believe the ICC [Indian Claims Commission] should decline to hear the matter given our concerns raised above.[6]

---

[5] Chief Robert Johnson, Kluane First Nation, to David E. Osborn, Commisson Counsel, ICC, October 4, 1999.

[6] Jeffrey A. Hutchinson, Counsel, DIAND Legal Services, Department of Justice Canada, to Ralph Keesickquayash, Associate Counsel, ICC, January 28, 2000. Underlined emphasis in original.

This jurisdictional challenge was brought before the Commission at a hearing in Vancouver, on September 12, 2000. The panel hearing the oral submissions of Canada and the First Nation consisted of Commissioners P.E. James Prentice, QC, Carole T. Corcoran, and Elijah Harper.

The parties had agreed to submit written arguments to the Commission in support of their respective positions on these issues, and at the September 12 hearing the Commissioners therefore had before them Canada's written submissions of March 31, 2000, the First Nation's brief of April 20, 2000, and Canada's reply of May 11, 2000.

Following the hearing, but before the Commission had issued this ruling, Commissioner Harper resigned from the Commission and Commissioners Prentice and Corcoran agreed, with the concurrence of both parties, that they would render this decision as a two-member panel.

THE INDIAN CLAIMS COMMISSION

The Commission's mandate to conduct inquiries pursuant to the *Inquiries Act* is set out in a commission issued on September 1, 1992. It directs:

> that our Commissioners on the basis of Canada's Specific Claims Policy ... by considering only those matters at issue when the dispute was initially submitted to the Commission, inquire into and report on:
>
> (a) whether a claimant has a valid claim for negotiation under the Policy where that claim has already been rejected by the Minister; and
>
> (b) which compensation criteria apply in negotiation of a settlement, where a claimant disagrees with the Minister's determination of the applicable criteria.[7]

The Specific Claims Policy is set forth in a 1982 booklet published by the Department of Indian Affairs and Northern Development entitled *Outstanding Business: A Native Claims Policy – Specific Claims*.[8] In considering a specific claim submitted by a First Nation to Canada, the Commission must assess whether Canada owes an outstanding lawful obligation to the First Nation in accordance with the provisions of *Outstanding Business*, which states:

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[7] Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991 (Consolidated Terms of Reference).

[8] Department of Indian Affairs and Northern Development (DIAND), *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), reprinted (1994), 1 ICCP 171 (hereafter *Outstanding Business*).

> The government has clearly established that its primary objective with respect to specific claims is to discharge its lawful obligation as determined by the courts if necessary.[9]

The Specific Claims Policy itself defines "lawful obligation" in this manner:

> **1) Lawful Obligation**
>
> The government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding "lawful obligation," i.e., an obligation derived from the law on the part of the federal government.
>
> A lawful obligation may arise in any of the following circumstances.
>
> i) The non-fulfillment of a treaty or agreement between Indians and the Crown.
>
> ii) A breach of obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations thereunder.
>
> iii) A breach of an obligation arising out of government administration of Indian funds or other assets.
>
> iv) An illegal disposition of Indian land.[10]

THE ISSUE

The issue before the Commission at this time is whether the claim being put forward by the Kluane First Nation can be properly said to be a "specific claim" within the meaning of Canada's Specific Claims Policy.

Canada submits that this claim is not a specific claim and that the Commission lacks the requisite jurisdiction to consider it at all. Canada contends that this claim is wholly based on the traditional native use and occupancy of lands, with the result that the claim falls within the scope of the Comprehensive Claims Policy and beyond the mandate of the Commission.[11] The First Nation, conversely, insists that, because the claim grew out of a specific, historical incident – the creation of the Parks without Canada first consulting the First Nation or properly accounting for the First Nation's "livelihood interests" – it is quite properly characterized as a breach of fiduciary obligation, and thus constitutes an outstanding lawful obligation under the Specific Claims Policy. The First Nation acknowledges the fact that its interest in the lands dedicated for Park purposes was, at the time, aboriginal in nature but argues that the fundamental character of the claim is a breach of fiduciary obligation.

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[9] *Outstanding Business*, 19; reprinted (1994), 1 ICCP 171 at 179.

[10] *Outstanding Business*, 20; reprinted (1994), 1 ICCP 171 at 179.

[11] ICC Transcript, September 12, 2000, pp. 8, 17, and 26 (Aly Alibhai).

We must address two preliminary matters before ruling on this question.

PRELIMINARY MATTERS

Estoppel

At the hearing on September 12, 2000, the Kluane First Nation implied that Canada's conduct should estop it from raising a jurisdictional challenge to the authority of this Commission – on the basis that Canada's representatives had rejected the claim and had, in fact, encouraged the First Nation to proceed before the Commission.[12] Moreover, in the First Nation's view, the Commission has wide powers to review Canada's reasons for rejecting a claim, and, once a claim has been rejected and the Commission has exercised its power to conduct an inquiry, it is open to the Commission to fulfill its function.[13]

Certainly, it is true that the Director General of the Specific Claims Branch, Paul Cuillerier, advised the First Nation on March 25, 1999, that it had "the option to submit a rejected claim to the Indian Claims Commission and request that the Commission hold an inquiry into the reasons for the rejection."

Is it now open to Canada to argue that the Commission lacks the jurisdiction to hear this claim?

Canada asserts that it is not inconsistent for its representatives to first inform the First Nation of the option of proceeding to the Commission, and then to take the position, once the First Nation has requested such a review, that the Commission does not have jurisdiction to hear the matter. Indeed, Canada submits that it is *obliged* to bring the Commission's availability to the First Nation's attention, and that those First Nations who are represented by counsel should be fully aware that it is always open to Canada to challenge the Commission's mandate.[14] Moreover, by agreeing to review the claim, the Commission is not bound, in Canada's view, to conduct an inquiry.[15]

The Commission agrees that Canada is not estopped from challenging the Commission's jurisdiction, nor is the Commission able to proceed if we should determine that this issue is beyond our mandate. The Commission is nonetheless disturbed by the fact that Canada would, on the one hand, encourage a claimant First Nation to seek redress at this Commission and, on the other, assert that the Commission lacks the required mandate to hear the case once the First Nation proceeds. The unfairness to the First Nation from this change in Canada's position is self-evident. We believe that, unless Canada is prepared to assume the full costs of abortive claims to the Commission, it should revisit the form of its rejection letters with a view to making it clear to claimant First Nations that, although they may proceed to the Commission as a matter of right once their claims have been rejected, Canada may well contest the Commission's jurisdiction in those cases where Canada believes that the claim falls outside the scope of the Specific Claims Policy.

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[12] ICC Transcript, September 12, 2000, pp. 139–40 (Dave Joe).
[13] ICC Transcript, September 12, 2000, pp. 100-1 (Dave Joe).
[14] ICC Transcript, September 12, 2000, pp. 154-56 (Aly Alibhai).
[15] ICC Transcript, September 12, 2000, p. 175 (Aly Alibhai).

The Yukon Umbrella Final Agreement

A second aspect of this case requiring preliminary comment is the Yukon Umbrella Final Agreement. An important aspect of Canada's application challenging the Commission's mandate to hear this claim is the First Nation's ongoing comprehensive claim negotiation with Canada and the Yukon Territorial Government arising out of the Yukon Umbrella Final Agreement signed May 29, 1993 (the "Umbrella Agreement").[16]

Under the terms of that agreement, Canada, Yukon, and 14 Yukon First Nations – represented by the Council for Yukon Indians – agreed to negotiate individual final agreements that would incorporate the general terms of the Umbrella Agreement, as well as more specific provisions that would apply to individual First Nations. The parties concur that negotiations are ongoing and that certain issues remain outstanding, including the question of compensation for the creation of the Parks.

During oral argument, counsel for the First Nation contended that, in the course of the comprehensive claims negotiations, Canada's negotiators had advised the First Nation to refrain from pursuing compensation for the Parks issue since the compensation criteria in the Umbrella Agreement did not contemplate claims of that nature.[17] According to Kluane's counsel, although Canada's representatives may not have stated expressly that the Parks issue should be addressed under the Specific Claims Policy, they "certainly implied that."[18] Counsel further submitted that the Parks issue has not been factored into the level of compensation payable to the First Nation under the Umbrella Agreement.[19] He acknowledged, however, that, in his view, the certainty clause of the Umbrella Agreement would preclude the First Nation from pursuing compensation for the Parks issue, whether as a comprehensive claim or a specific claim, once a final agreement had been signed. To date that has not happened.

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[16] DIAND, *Umbrella Final Agreement, Council for Yukon Indians* (Ottawa, 1993).

[17] ICC Transcript, September 12, 2000, pp. 139-40 (Dave Joe).

[18] ICC Transcript, September 12, 2000, p. 150 (Dave Joe).

[19] ICC Transcript, September 12, 2000, p. 142 (Dave Joe).

The certainty clause in the Umbrella Agreement states:

> **2.5.0 Certainty**
>
> 2.5.1 In consideration of the promises, terms, conditions and provisos in a Yukon First Nation's Final Agreement:
>
> ...
>
> 2.5.1.4 neither that Yukon First Nation nor any person eligible to be a Yukon Indian Person it represents, their heirs, descendants and successors, shall, after the Effective Date of that Yukon First Nation's Final Agreement, assert any cause of action, action for declaration, claim or demand of whatever kind or nature, which they ever had, now have, or may hereafter have against Her Majesty the Queen in Right of Canada, the Government of any Territory or Province, or any person based on,
>
> (a) any aboriginal claim, right, title or interest ceded, released or surrendered pursuant to 2.5.1.1 and 2.5.1.2,
> (b) any aboriginal claim, right, title or interest in and to Settlement Land, lost or surrendered in the past, present or future, or
> (c) any claim, right or cause of action described in 2.5.1.3.[20]

For its part, Canada takes the position that the question of the compensation, if any, to which the First Nation should be entitled for the creation of the Parks was squarely before the negotiators in the comprehensive claims process and should remain on that table. As counsel stated:

> I can say, Mr. Chairman and counsel, that what I've been told very clearly is that it is not, in fact, the position of the negotiator for the Government of Canada at the Comprehensive Claims table that this is a Specific Claim.
>
> In fact I could say unequivocally that the negotiator acting on behalf of Canada has not encouraged the First Nation to submit this as a Specific Claim. I can't say whether he has discouraged it, but certainly I am informed that the negotiator has not encouraged it, and I am also further informed that the negotiator acting for the government side has always maintained ... that this is in the nature of a Comprehensive Claim.[21]

---

[20] DIAND, *Umbrella Final Agreement, Council for Yukon Indians* (Ottawa, 1993), 15-16.
[21] ICC Transcript, September 12, 2000, pp. 159-60 (Aly Alibhai).

In fact, it is Canada's view that the compensation offered to the First Nation is sufficient to compensate the First Nation for all claims on the table in the comprehensive claims process, including the Parks issue.[22] In essence, Canada's position is that, in addition to the Parks issue being a comprehensive claims matter and therefore beyond the scope of the Commission's mandate, the claim has already been addressed and the First Nation should not be given the opportunity to reopen it by "forum shopping."

In our view, Canada and the First Nation disagree on whether the issue before the Commission has formed part of their comprehensive claims negotiations. We would in any event question whether the basis on which the parties have been negotiating is relevant to the issue of whether the Commission has jurisdiction under the Specific Claims Policy. Certainly, had the parties successfully negotiated an agreement that had the effect of resolving the present dispute, that agreement would be relevant and would presumably preclude the Commission from exercising jurisdiction. However, we do not understand that to be the case, and, for that reason, the Commission will determine, without having regard for those negotiations, whether the Parks claim falls within the scope of the Specific Claims Policy.

THE NATURE OF THE ABORIGINAL RIGHTS OF THE FIRST NATION

From Canada's perspective, for the First Nation to establish a breach of duty arising from the creation of the Parks, it must demonstrate an interest in those lands that Canada would have been duty-bound to protect. Counsel argues that the lands do not constitute "reserves" within the meaning of that term in the *Indian Act*, and for the First Nation to suggest that they *are* reserves would likely constitute a new claim. The only basis on which the First Nation can claim an interest, according to counsel, is by virtue of traditional use and occupancy of those lands – in other words, aboriginal title or rights – which the First Nation has not yet proven and Canada has not yet recognized or acknowledged. To put forward a claim of the type currently being made by the First Nation requires, in counsel's view, a "huge assumption" that aboriginal title in the Park lands has been established.[23] Nevertheless, even if the First Nation *could* establish aboriginal title or rights to the Park lands, Canada contends that it is precisely such native use and occupancy that the Specific Claims Policy identifies as being beyond its scope and to be dealt with under the Comprehensive Claims Policy.[24]

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[22] ICC Transcript, September 12, 2000, p. 85 (Aly Alibhai).

[23] ICC Transcript, September 12, 2000, p. 55 (Aly Alibhai).

We are troubled by Canada's view that aboriginal peoples cannot assert aboriginal rights unless Canada has recognized those rights or the courts have ruled that those rights exist. There is no doubt in the Commission's mind that the Kluane are aboriginal people. It seems evident that they resided in the Parks area and used it to gain their livelihood before settlers arrived. Similarly, it appears to be without question that the creation of the Parks has resulted in members of the First Nation being deprived of some or all of the areas they traditionally used and occupied for such purposes. Notwithstanding Canada's expression in clause 2.6.4 of the Umbrella Agreement that it does not *admit* to the First Nation having "any aboriginal rights, title or interests anywhere within the sovereignty or jurisdiction of Canada," neither is there anything in the record before us to indicate that Canada *denies* the First Nation's residence on, and use and occupancy of, the Park lands. Indeed, a reading of Canada's comprehensive claims policy, *In All Fairness*, indicates that Canada conducts comprehensive negotiations with those First Nations who are assumed to have unextinguished aboriginal rights or title, notwithstanding that Canada, presumably for reasons of preserving its legal position, does not admit that fact in specific cases. Canada has been negotiating with the Kluane First Nation for more than 20 years, and it would be dishonourable for Canada to now deny the *prima facie* claim of the Kluane people to the area in question.

The real question is whether the facts of this case as alleged can be said to constitute a specific claim.

For the purposes of the present application regarding the scope of our mandate, it is unnecessary for the First Nation to *prove* or the Commission to *assume* the validity of aboriginal rights or title in the Park lands. In our view, it is sufficient to say that *the basis on which the claim is being put forward* is Canada's failure to consult the First Nation on the creation of the Parks or to compensate it for its loss. At this stage of the proceedings, we are concerned only with whether it is open to us to consider a claim of the type that the First Nation has placed before us, not with whether the First Nation has been able to fully establish its claim. That remains to be determined at a hearing on the merits, should such a hearing be required.

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[24] ICC Transcript, September 12, 2000, pp. 29-30 (Aly Alibhai).

DOES THIS CLAIM FALL WITHIN *OUTSTANDING BUSINESS* OR *IN ALL FAIRNESS*?

The essential question to be determined in this case is whether the claim being put forward by the Kluane First Nation can properly be said to be a "specific claim" within the meaning of Canada's Specific Claims Policy. If it is not, this Commission lacks the requisite jurisdiction to address it.

Canada submits that this claim is based on traditional native use and occupancy of lands and accordingly falls within the scope of the Comprehensive Claims Policy and beyond the mandate of the Commission.[25] In contrast, the First Nation insists that, because the claim grew out of a specific, historical incident – the creation of the Parks without Canada first consulting the First Nation or properly accounting for the First Nation's "livelihood interests" – the claim is more properly characterized as a breach of fiduciary obligation. In the First Nation's view, the fact that its interest in the lands dedicated for Park purposes may have been aboriginal in nature is purely ancillary, given that "the Supreme Court of Canada has held that the Indian interest in the land is the same for reserve lands and aboriginal title lands."[26]

For the Commission to be able to characterize this claim properly, it is essential to have careful regard for the terms of the two claims policies. In doing so, we must consider not only what each policy says about its *own* scope, but also what each policy says about the scope of the *other* policy.

The Comprehensive Claims Policy

The booklet outlining the Comprehensive Claims Policy, *In All Fairness*, was the first to appear, in 1981. Its foreword contains a broad statement of the kinds of claims contemplated by the policy and distinguishes specific claims for which the government intended to issue another policy in the near future:

> **FOREWORD**
>
> Essentially what is being addressed here are claims based on the concept of "aboriginal title" – their history, current activities surrounding them, and our proposals for dealing with them in the future. *While this statement is concerned with*

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[25] ICC Transcript, September 12, 2000, pp. 8, 17, and 26 (Aly Alibhai).

[26] Dave Joe, Legal Counsel, Kluane First Nation, "Specific Claim for the Kluane First Nation," October 2, 1996, p. 9. Although the First Nation did not identify the Supreme Court of Canada decision to which it was referring, we presume that it was citing *Guerin v. The Queen*, [1984] 2 SCR 335, in which Dickson J (as he then was) stated at 379: "It does not matter, in my opinion, that the present case is concerned with the interest of an Indian Band in a reserve rather than with unrecognized aboriginal title in traditional tribal lands. The Indian interest in the land is the same in both cases: see *Attorney-General for Quebec v. Attorney-General for Canada*, [1921] 1 AC 401, at 410–11 (the *Star Chrome* case)."

> *claims of this nature it does not preclude government consideration of claims relating to historic loss of lands by particular bands or groups of bands. Indeed, the government, in consultation with Indian organizations across Canada, is currently reviewing its policy with respect to specific claims over a wide spectrum of historic grievances* – unfulfilled treaty obligations, administration of Indian assets under the Indian Act and *other matters requiring attention*. A further statement on government intentions in the area of specific claims will be issued upon completion of that review process.[27]

Part One of the Comprehensive Claims Policy provides a general overview of Canada's intentions regarding the "recognition of Native land rights" and the negotiation of "fair and equitable settlements":

> ### INTRODUCTION
>
> Indian and Inuit people through their associations have presented formal land claims to the Government of Canada for large areas of the country. In response to their claims, the government has three major objectives:
>
> 1. To respond to the call for recognition of Native land rights by negotiating fair and equitable settlements;
> 2. To ensure that settlement of these claims will allow Native people to live in the way they wish;
> 3. That the terms of settlement of these claims will respect the rights of all other people.
>
> The present policy statement is meant to elaborate the Government of Canada's commitment to the Native people of Canada in the resolution of these claims. Comprehensive land claims relate to the traditional use and occupancy and the special relationships that Native people have had with the land since time immemorial.
>
> ### RECENT HISTORY
>
> Prior to 1973 the government held that aboriginal title claims were not susceptible to easy or simple categorization; that such claims represented, for historical and geographical reasons, such a bewildering and confusing array of concepts as to make it extremely difficult [for] either the courts of the land or the government of the day to deal with them in a way that satisfied anyone. Consequently, it was decided such claims could not be recognized.
>
> However, by early 1973 the whole question of claims based on aboriginal title again became a central issue; the decision of the Supreme Court of Canada in the Calder Case, an action concerning the right of assertion of Native title by the Nishga Indians of British Columbia, established the pressing importance of this matter. Six of the judges acknowledged the existence of aboriginal title. The court itself, however,

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[27] DIAND, *In All Fairness: A Native Claims Policy* (Ottawa, 1981), 3. Emphasis added.

while dismissing the claim on a technicality, split evenly (three-three) on the matter raised: did the native or aboriginal title still apply or had it lapsed? At the same time, the Cree of James Bay and the Inuit of Arctic Québec were trying to protect their position in the face of the James Bay Hydro Electric project.

It is from these actions that the current method of dealing with Native claims emerged.

A policy statement in 1973 covered two areas of contention. *The first was concerned with the government's lawful obligations to Indian people. By this was meant the questions arising from the grievances that Indian people might have about fulfillment of existing treaties or the actual administration of lands and other assets under the various Indian Acts.*

The policy statement acknowledged another factor that needed to be dealt with. Because of historical reasons – continuing use and occupancy of traditional lands – there were areas in which Native people clearly still had aboriginal interests. Furthermore these interests had not been dealt with by treaty nor did any specific legislation exist that took precedence over these interests. *Since any settlement of claims based on these criteria could include a variety of terms such as protection of hunting, fishing and trapping, land title, money, as well as other rights and benefits, in exchange for a release of the general and undefined Native title, such claims came to be called comprehensive claims.*

In short, the statement indicated two new approaches in respect to comprehensive claims. The first was that the federal government was prepared to accept land claims based on traditional use and occupancy and second, that although any acceptance of such a claim would not be an admission of legal liability, the federal government was willing to negotiate settlements of such claims.[28]

Part Two of the Comprehensive Claims Policy sets forth Canada's view of "the essential factors necessary for the achievement of comprehensive land claims settlements":

BASIC GUIDELINES

When a land claim is accepted for negotiation, the government requires that the negotiation process and settlement formula be thorough so that the claim cannot arise again in the future. In other words, any land claims settlement will be final. The negotiations are designed to deal with non-political matters arising from the notion of aboriginal land rights such as, lands, cash compensation, wildlife rights, and may include self-government on a local basis.

The thrust of this policy is to exchange undefined aboriginal land rights for concrete rights and benefits. The settlement legislation will guarantee these rights and benefits.

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[28] DIAND, *In All Fairness: A Native Claims Policy* (Ottawa, 1981), 7 and 11-12. Emphasis added.

> **ALTERNATIVES CONSIDERED**
>
> ... There are a number of compelling advantages to the negotiation process, as the federal government sees it. *The format permits Natives not only to express their opinions and state their grievances, but it further allows them to participate in the formulation of the terms of their own settlement. When a settlement is reached, after mutual agreement between the parties, a claim can then be dealt with once and for all. Once this is achieved, the claim is nullified.*[29]

In our view, the general intent of *In All Fairness* is to establish a framework for the negotiation of settlements of aboriginal land claims in Canada. The policy refers repeatedly to the essence or "thrust" of comprehensive claims being the exchange of "general and undefined Native title" and "undefined aboriginal land rights" for "concrete rights and benefits." It seems apparent from our review of the policy as a whole that comprehensive claims encompass those issues arising as a matter of ***the existence and content of aboriginal rights or title*** rather than grievances resulting from ***Canada's past conduct***. We agree with counsel for the First Nation when he comments that Canada developed the Comprehensive Claims Policy to deal with the exchange of rights, and then dealt with the residual conduct-related claims in *Outstanding Business*.[30]

We are also of the view that the Comprehensive Claims Policy itself contemplates the possibility that certain historical grievances should be addressed within the context of the Specific Claims Policy, even though the factual or legal underpinning of those claims is based, in part, upon the aboriginal status of a band or upon the relationship of its members with the land upon which they reside. For example, the phrase "claims relating to historic loss of lands by particular bands or groups of bands" in the foreword clearly contemplates claims that would fall ***not*** within the Comprehensive Claims Policy but within the then yet-to-be-released Specific Claims Policy.

We appreciate that Canada does not necessarily agree with the Commission's interpretation in this respect. In arguing that not "every single historic loss of any kind whatsoever falls within the Specific Claims Policy," Canada contends that the historical losses referred to in the Comprehensive Claims Policy do not relate to losses of ***traditional*** territory but rather to only the types of losses contemplated by the four categories of lawful obligation set forth in the Specific Claims Policy.[31] We disagree with that submission, primarily because we do not agree that the Specific Claims Policy itself is limited in the manner that Canada suggests.

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[29] DIAND, *In All Fairness: A Native Claims Policy* (Ottawa, 1981), 19 and 21. Emphasis added.
[30] ICC Transcript, September 12, 2000, p. 132 (Dave Joe).

For the moment, we would only observe that we see no reason why the words "historic loss of lands," without further qualification, would not equally permit consideration under the Specific Claims Policy of losses of aboriginal lands as well as losses of reserve lands.

We do not wish to be taken as suggesting that historical grievances should not be resolved within the context of comprehensive negotiations. Clearly it is in the interests of both Canada and a First Nation to resolve both past grievances and future issues at the comprehensive claims table. Although the primary thrust of the Comprehensive Claims Policy is the *exchange* of undefined aboriginal land rights for concrete rights and benefits, there is room within its ambit to deal with compensation for past grievances arising from governmental incursions into aboriginal rights and title. We would fully expect that such grievances would often be aired and addressed at the comprehensive claims table, just as the Parks issue was, at least to some extent, discussed by the parties in this case.

The issue before our Commission, however, is not whether this particular historical grievance should or should not be addressed within the context of comprehensive claims negotiations, but rather whether the First Nation is precluded from advancing the claim as a specific claim under the Specific Claims Policy. It is that Policy to which we now turn.

The Specific Claims Policy

What remains to be determined, then, is whether the present claim also falls within the scope of the Specific Claims Policy. Can an historical grievance of the nature alleged in these proceedings be the subject matter of a comprehensive claims negotiation as well as an outstanding lawful obligation under the Specific Claims Policy?

The foreword to *Outstanding Business* is an important place to begin:

> **FOREWORD**
>
> ***The claims referred to in this booklet deal with specific actions and omissions of government as they relate to obligations undertaken under treaty, requirements spelled out in legislation and responsibilities regarding the management of Indian assets.*** They have represented, over a long period of our history, outstanding

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[31] ICC Transcript, September 12, 2000, pp. 54 and 85 (Aly Alibhai).

> business between Indians and government which for the sake of justice, equity and prosperity now must be settled without further delay.[32]

Part One of *Outstanding Business* discusses the scope of the Specific Claims Policy and contrasts the policy against the Comprehensive Claims Policy, *In All Fairness*:

> **INTRODUCTION**
>
> The federal government's policy on Native claims finds its genesis in a statement given in the House of Commons on August 8, 1973 by the Minister of Indian Affairs and Northern Development. Since that time experience and consultations with Indian bands and other Native groups and associations have prompted the government to review and clarify its policies with respect to the *two broad categories of claims: comprehensive claims and specific claims.*
>
> *The term "comprehensive claims" is used to designate claims which are based on traditional Native use and occupancy of land.* Such claims normally involve a group of bands or Native communities within a geographic area and are comprehensive in their scope including, for example, land, hunting, fishing and trapping rights and other economic and social benefits.
>
> The government has already made public its policy on comprehensive claims in a booklet entitled *In All Fairness*, published in December 1981. *The term "specific claims" with which this booklet deals refers to those claims which relate to the administration of land and other Indian assets and to the fulfillment of treaties.*
>
> ...
>
> **INDIAN TREATIES**
>
> Treaties play a significant part in the heritage of Canada's Indians and are central to many of their existing claims. As far back as the Royal Proclamation of 1763, the British sovereign recognized an Indian interest in the lands occupied by various Indian tribes which could only be ceded to, or purchased by, the Crown. This policy led to the tradition of making agreements, or treaties as they were later called, with the Indians.
>
> ...
>
> **THE INDIAN ACT**
>
> *As well as being concerned with the fulfillment of Indian treaties, specific claims relate to the administration of land and other assets under the Indian Act.* Such land and other assets, mainly in the form of money, were derived in large measure from the treaties and earlier Indian agreements with the Crown or found their origin in colonially established Indian reserves and funds. Again, in some cases, they came from what had been church administered holdings. All were brought within the aegis

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[32] *Outstanding Business*, 3; reprinted (1994), 1 ICCP 171 at 173.

> of a series of post-Confederation Acts beginning in May 1868, with legislation giving the Secretary of State control over the management of Indian lands and property and all Indian funds. The first *Indian Act* of 1876 and its several subsequent versions maintained the principle of government responsibility for the management of Indian assets.
>
> The two principal categories of Indian assets which fall under federal government management are Indian reserve lands and Indian band funds and hence are most often at the centre of Indian claims where breach of an obligation arising out of government administration is asserted. In turn, land-related claims have to date been most frequently raised. The latter may find their origin in such areas as the taking of reserve lands without lawful surrender by the band concerned or failure to pay compensation where lands were taken under legal authority.
>
> ...
>
> **RECENT HISTORY**
>
> Over the years following the signing of the treaties, Indians concluded that the government had not fulfilled all of its commitments to them. Some Indians maintained that the government had reneged on some of its promises under treaty. Others charged that the government had deliberately disposed of their reserve lands without first securing their permission. Claims of mismanagement of band funds and other assets were presented to government.
>
> Faced with an increase of such claims and a growing discontent among the Indian population, the government determined to give careful consideration to each of these claims in order to determine their validity and its responsibility.
>
> In 1969 the Government of Canada stated as public policy that its lawful obligations to Indians, including the fulfillment of treaty entitlements, must be recognized. This was confirmed in the 1973 *Statement on Claims of Indian and Inuit People. The 1973 statement recognized two broad classes of native claims – "comprehensive claims": those claims which are based on the notion of aboriginal title; and "specific claims": those claims which are based on lawful obligations.*[33]

As can be seen from the foregoing section entitled The *Indian Act*, the *principal* – but by no means the *only* – categories of Indian assets falling under the Specific Claims Policy are Indian *reserve lands* and Indian band funds. However, the words of the Introduction contain no language limiting the scope of specific claims to matters arising under the *Indian Act* and no wording restricting "claims that relate to the administration of land" to reserve lands. We can only conclude that Canada's intention in referring to "reserve lands" in some instances and "lands" in others is meant to differentiate between the two terms. It is particularly significant, in our view, that Part Two of the Specific Claims Policy, which establishes the concept of "lawful obligation," makes no mention of reserves at all:

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[33] *Outstanding Business*, 7, 9, 11, and 13; reprinted (1994), 1 ICCP 171 at 174–76. Emphasis added.

> **THE POLICY: A RENEWED APPROACH**
> **TO SETTLING SPECIFIC CLAIMS**
>
> *The government has clearly established that its primary objective with respect to specific claims is to discharge its lawful obligation as determined by the courts if necessary*. Negotiation, however, remains the preferred means of settlement by the government, just as it has been generally preferred by Indian claimants. In order to make this process easier, the government has now adopted a more liberal approach eliminating some of the existing barriers to negotiations.
>
> As noted earlier *the term "specific claims" refers to claims made by Indians against the federal government which relate to the administration of land and other Indian assets and to the fulfillment of Indian treaties.*
>
> **1) LAWFUL OBLIGATION**
>
> *The government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding "lawful obligation," i.e., an obligation derived from the law on the part of the federal government.*
>
> A lawful obligation may arise in any of the following circumstances:
>
> i) The non-fulfillment of a treaty or agreement between Indians and the Crown.
> ii) A breach of an obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations thereunder.
> iii) A breach of an obligation arising out of government administration of Indian funds or other assets.
> iv) An illegal disposition of Indian land.[34]

It is this concept of "lawful obligation" that is the essence of the Specific Claims Policy. It is, by definition, a fluid and evolving concept because the nature and scope of those obligations which are, in law, owed to First Nations will continue to evolve through the process of judicial determination in Canada. Our Commission has said previously that the inherent wisdom of the Specific Claims Policy resides in its reliance upon an evolving definition of that which is lawful and owing. There is justice in such an approach.

The Specific Claims Policy was created with the idea of providing a practical remedy to legitimate, long-standing grievances. It is also remedial in the sense that the concept of lawful obligation is not only an evolving one, but also one that is very broad in nature – essentially it provides a "catch-all" for dealing with virtually all conduct-related historical grievances. In that spirit, and with a view to achieving the "justice, equity and prosperity" that the Policy itself references, we are of the view that the Policy should be given a broad interpretation befitting its remedial nature.

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[34] *Outstanding Business*, 19-20; reprinted (1994), 1 ICCP 171 at 179. Emphasis added.

The Commissioners have concluded that the claim brought forth by the Kluane First Nation does fall within the scope of the Specific Claims Policy and that it is therefore within the mandate of this Commission to review Canada's rejection of this claim. We do not suggest that the claim is valid *per se*, for that determination has not yet been made. We are, however, confident that the claim is in the nature of a specific claim. We say so because we are of the opinion that a claim of the nature advanced by the Kluane First Nation falls within the Specific Claims Policy in three demonstrable ways:

- the essence of the claim is an allegation of a breach of fiduciary obligation, which is arguably an "outstanding lawful obligation" within the general language at page 20 of the Policy;
- the claim involves an allegation of a breach of an obligation in a statute pertaining to Indians – namely, the *Rupert's Land and North-Western Territory Order* – and such a matter arguably falls within the specific ground enumerated as item (ii) at page 20 of the Policy; and
- the claim involves an allegation of an illegal disposition of Indian land, and such a matter arguably falls within the specific ground enumerated as item (iv) at page 20 of the Policy.

Our reasons follow.

Does a Claim of This Sort Fall within One of the Four Listed Categories of Lawful Obligation?

Outstanding Business enumerates four categories of lawful obligation. These are:

> i) The non-fulfillment of a treaty or agreement between Indians and the Crown.
> ii) A breach of an obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations thereunder.
> iii) A breach of an obligation arising out of government administration of Indian funds or other assets.
> iv) An illegal disposition of Indian land.[35]

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[35] *Outstanding Business*, 20; reprinted (1994), 1 ICCP 171 at 179.

Canada submits that the First Nation does not have and never has had a treaty with Canada or the United Kingdom,[36] and the First Nation has not taken issue with this statement. Nor has the First Nation alleged the existence of an agreement, the breach of which gives rise to this claim, or a breach of an obligation arising out of government administration of Indian funds or other assets. We would concur that the first and third categories of lawful obligation which are listed above are therefore irrelevant.

Breach of Statutory Obligation

The Kluane people argue that, when Canada permitted the creation of the Parks without consulting or compensating them, it breached an obligation arising out of a statute pertaining to Indians. The First Nation's submission on this point is based on the Order in Council admitting Yukon into Canada. That Order in Council is premised on section 146 of the *Constitution Act, 1867*, which states:

> **146.** *It shall be lawful for the Queen*, by and with the Advice of Her Majesty's Most Honourable Privy Council, ... on Address from the Houses of the Parliament of Canada *to admit Rupert's Land and the North-western Territory, or either of them, into the Union*, on such Terms and Conditions in each Case as are in the Addresses expressed and as the Queen thinks fit to approve, subject to the Provisions of this Act; *and the Provisions of any Order in Council in that Behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland.*[37]

Shortly after Confederation, the Senate and House of Commons by joint address issued a request to the British Crown seeking the union of Rupert's Land and the North-Western Territory with the rest of Canada. By means of an Order in Council dated June 23, 1870, which has come to be known as the ***Rupert's Land and North-Western Territory Order***, this request was granted, subject to, among other things, the following condition:

> upon the transference of the territories in question to the Canadian Government, the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines.[38]

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[36] ICC Transcript, September 12, 2000, p. 10 (Aly Alibhai).

[37] *Constitution Act, 1867* (UK), 30 & 31 Vict., c. 3. Emphasis added.

[38] *Rupert's Land and North-Western Territory Order*, June 23, 1870.

The *Rupert's Land and North-Western Territory Order* has gained constitutional status by virtue of section 52 of the *Constitution Act, 1982*, which provides as follows:

> **52.**(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.
>
> (2) The Constitution of Canada includes
> (a) the *Canada Act* 1982, including this Act;
> (b) the Acts and orders referred to in the schedule; and
> (c) any amendment to any Act or order referred to in paragraph (a) or (b).[39]

The *Rupert's Land and North-Western Territory Order* is the third item in Schedule I.

It seems apparent to the Commission that, given its constitutional nature and the wording of section 146 of the *Constitution Act, 1867*, the *Rupert's Land and North-Western Territory Order* must be considered a statute pertaining to Indians within the meaning of the second category of lawful obligation in *Outstanding Business*.

The *Rupert's Land and North-Western Territory Order* certainly does give rise to a number of very difficult aboriginal and constitutional law questions, both generally and in the context of this specific claim. For example, what are "the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines"? In the First Nation's view, this constitutional obligation should be interpreted in accordance with the principles of interpretation applicable to statutes relating to Indians.[40] The First Nation also argues that "the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines" are those principles captured in the provisions of the *Royal Proclamation of 1763* which, by virtue of being incorporated by reference in the *Rupert's Land and North-Western Territory Order*, should apply to the Park lands. In contrast, Canada takes the position that the *Royal Proclamation* is irrelevant because it simply forms the basis for surrenders and designations of reserve lands whereas this claim does not deal with reserve lands at all.[41]

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[39] *Constitution Act, 1982*, s. 52, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11.

[40] Dave Joe, Legal Counsel, Kluane First Nation, "Specific Claim for the Kluane First Nation," October 2, 1996, p. 23.

[41] ICC Transcript, September 12, 2000, pp. 40-41 and 70 (Aly Alibhai).

In our view, it is unnecessary for us to decide these issues at this time. For the purposes of this jurisdictional challenge, it is necessary only that we satisfy ourselves that the question of whether Canada failed to compensate the Kluane people or to have regard for their interests in the creation of the Parks is, at least in part, a question arising from an alleged breach of an obligation arising out of a statute pertaining to Indians. In our view, it is, and accordingly we find that the claim qualifies to be heard under the second listed category of lawful obligation in *Outstanding Business*.

Illegal Disposition of Indian Land

With regard to the fourth category of lawful obligation, the First Nation submits that the term "Indian land" in the Specific Claims Policy is not restricted to reserves under the *Indian Act*.[42] By implication, it is the First Nation's position that, when Canada allowed third parties or other government departments to "encroach" on the First Nation's traditional territories, Canada permitted an illegal disposition of Indian land.

Canada submits that the lands in question are not reserve lands under the *Indian Act* and, for this reason, they do not constitute "Indian land" under the Specific Claims Policy.[43] In addition, if the First Nation should seek to assert that the Park lands *were* reserve lands under the *Indian Act*, then, in Canada's view, it would have to do so explicitly, and that would likely comprise a new claim.[44] Moreover, as Canada argues, there is nothing in *Outstanding Business* to suggest that it is intended to apply to all lands coming within the scope of Canada's jurisdiction in section 91(24) of the *Constitution Act, 1867*, to legislate with regard to "Indians, and Lands reserved for the Indians" since the Specific Claims Policy expressly excludes aboriginal titled lands from the operation of the Policy.[45]

For the purposes of this application, the Commission agrees with the First Nation that limiting the term "Indian land" to reserves under the *Indian Act* is too restrictive and that specific claims can be brought forward on a wider basis. As we have already stated, the Specific Claims Policy contains explicit references to reserve lands in some instances but it uses the more general term "Indian land" in the fourth category of lawful obligation. If Canada had intended *Outstanding Business* to apply only to lawful obligations arising in relation to reserve lands, it could have expressly said so, but it did not. We decline to adopt the narrower interpretation.

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[42] Written Submission on Behalf of the Kluane First Nation, April 20, 2000, p. 11.

[43] Paul Cuillerier, Director General, Specific Claims Branch, Indian and Northern Affairs Canada, to Chief Robert Johnson, Kluane First Nation, March 25, 1999, p. 2; Written Submission on Behalf of the Government of Canada, March 31, 2000, p. 8; ICC Transcript, September 12, 2000, p. 7 (Aly Alibhai).

[44] Rebuttal Submission on Behalf of the Government of Canada, May 11, 2000, pp. 1-2.

[45] Written Submission on Behalf of the Government of Canada, March 31, 2000, p. 8.

We acknowledge the argument by counsel for Canada that guideline 7 in Part Three of the Specific Claims Policy precludes claims involving aboriginal titled lands, and we will return to that argument below.

Does a Breach of Fiduciary Duty Give Rise to an Outstanding Lawful Obligation?

The Commission has consistently held that its jurisdiction is not exhausted by the four categories of lawful obligation enumerated in *Outstanding Business*. In a number of reports, we have expressed the view that the four categories are merely *examples* of circumstances in which a lawful obligation may arise.[46] More specifically, we have found that Canada's fiduciary obligations to First Nations are lawful obligations and that a claim based on a breach of fiduciary duty falls within the scope of the Specific Claims Policy. We see no reason to change our position here.

In our opinion, taking into account the broad object and purpose of the Specific Claims Policy, the most reasonable interpretation of "lawful obligation" is that it includes claims based on a breach of fiduciary obligation. The preamble to the definition of "lawful obligation" in *Outstanding Business* states:

> The government has clearly established that its primary objective with respect to specific claims is to discharge its *lawful obligation as determined by the courts* if necessary. Negotiation, however, remains the preferred means of settlement by the government, just as it has been preferred by Indian claimants. In order to make this process easier, the government has now adopted a more liberal approach eliminating some of the existing barriers to negotiations.[47]

When the Policy was published in 1982, the Supreme Court of Canada, as it was to do in *Guerin v. The Queen*,[48] had not yet recognized breach of fiduciary duty as a separate cause of action in the context of the Crown-aboriginal relationship. It is therefore understandable that fiduciary duty was not expressly referred to in the Policy. However, the Policy defines "lawful obligation" as "an obligation derived from the law on the part of the federal government." It is now well settled that the Crown's fiduciary relationship with First Nations can provide a distinct source of legal or equitable obligation.

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[46] ICC, *Primrose Lake Air Weapons Range Report II* (Ottawa, September 1995), reported (1996), 4 ICCP 47 at 62, n35; ICC, *Inquiry into the Claim of the Homalco Indian Band* (Ottawa, December 1995), reported (1996), 4 ICCP 89 at 106 and 159; ICC, *Inquiry into the Cormorant Island Claim of the 'N̲amgis First Nation* (Ottawa, March 1996), reported (1998), 7 ICCP 3 at 73; ICC, *Inquiry into the McKenna-McBride Applications Claim of the 'N̲amgis First Nation* (Ottawa, February 1997), reported (1998), 7 ICCP 109 at 187; ICC, *Inquiry into the McKenna-McBride Applications Claim of the Mamaleleqala Qwe'Qwa'Sot'Enox Band* (Ottawa, March 1997), reported (1998), 7 ICCP 199 at 271.

[47] *Outstanding Business*, 19; reprinted (1994), 1 ICCP 171 at 179. Emphasis added.

[48] *Guerin v. The Queen*, [1984] 2 SCR 335.

Since Canada intended to create a process that would allow it to settle specific claims without the involvement of the courts, a process that would evolve in an orderly way over time, it stands to reason that the four delineated examples of "lawful obligation" were not intended to be exhaustive. They simply illustrate the types of claims that can be dealt with under the Policy.

We appreciate that the Department of Indian Affairs and Northern Development – including, it would seem, the Minister of that department – does not agree with the Commission on this interpretation. Most recently in the context of the Commission's reports on the McKenna-McBride applications of the 'Namgis and Mamaleleqala First Nations, the Hon. Robert Nault expressed the following view to the Commission:

> The [Indian Claims Commission] has recommended a portion of each of these claims be accepted for negotiation. In the [Commission's] view, liability on the part of the Crown existed pursuant to the "Lawful Obligation" clause of *Outstanding Business*, Canada's Specific Claims Policy....
>
> After careful consideration of the Commission's report, I regret that I am unable to accept the [Commission's] recommendation.... Canada's response to each of the [Commission's] findings is as follows:
>
> (1) Canada rejects the [Commission's] finding that the enumerated examples of "lawful obligation" outlined in *Outstanding Business* were not intended to be exhaustive. Canada is of the view that outside the circumstances outlined in the "lawful obligation" and "beyond lawful obligation" clauses of *Outstanding Business* (i.e., a treaty obligation, statutory requirement and/or responsibility for management of Indian land or assets), fiduciary obligations are not "lawful obligations" within the meaning of the Specific Claims Policy. Only those fiduciary obligations arising within the context of lawful obligations (as defined in the policy) may fall within the scope of *Outstanding Business*.
>
> (2) Canada takes the position that: (a) there is no general fiduciary duty in relation to Aboriginal interests in non-reserve lands; and (b) the necessary elements required to establish a fiduciary obligation (i.e., a statute, agreement or unilateral undertaking to act for or in the interests of the First Nation; unilateral power to affect the First Nation's interests; and/or vulnerability on the part of the First

> Nation to the exercise of that power) were not present on the facts of these claims.
>
> (3) Canada's position remains, as has been articulated in response to other British Columbia specific claims dealing with the issue of Indian settlement lands [e.g., Homalco], that there is no general fiduciary obligation to protect traditional Indian settlement lands from the actions of other individuals or governments.[49]

With respect, the Minister is wrong.

In the context of the present inquiry, the issue is admittedly more difficult. Canada argues that the four categories in *Outstanding Business* are exhaustive but, even if they are not, claims based on breach of fiduciary obligation must still feature the same "pith and substance" as those categories. In other words, according to counsel, a claim of breach of fiduciary obligation will be acceptable and in keeping with the Specific Claims Policy where it relates to the administration of Indian assets under the *Indian Act* and treaty obligations – "the things that are at the core of a specific claim in its pure sense." Canada's counsel adds that construing the policy in the manner proposed by the First Nation would be inconsistent with the substance of *Outstanding Business* and indeed would undermine the policy by blurring the distinction between comprehensive and specific claims.[50] Although it may be "a given" that "a fiduciary duty or obligation can form the basis of a claim under the policy," counsel submitted that a claim "inextricably bound up in an assertion [of] aboriginal title or rights" does not fall within the scope of *Outstanding Business*.[51] Although it may appear to the First Nation that Canada is unfairly "pigeonholing" claims, Canada takes the position that the division of claims into the comprehensive and specific categories falls within its discretion as a matter of Crown prerogative. In making this division, counsel submits, Canada has excluded claims based on unextinguished native title from the Specific Claims Policy, and, although the First Nation deserves to have full consideration of its claim arising out of the creation of the Parks, that consideration should take place – and, in Canada's view, *has* taken place – in the context of comprehensive claims negotiations.[52]

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[49] Robert D. Nault, Minister of Indian Affairs and Northern Development, to Daniel J. Bellegarde and James Prentice, QC, Co-Chairs, Indian Claims Commission, December 8, 1999.

[50] ICC Transcript, September 12, 2000, pp. 79-81 (Aly Alibhai).

[51] ICC Transcript, September 12, 2000, p. 19 (Aly Alibhai).

[52] ICC Transcript, September 12, 2000, pp. 58-59 (Aly Alibhai).

The Commission finds that, although the Specific Claims Policy suggests "a more liberal approach eliminating some of the barriers to negotiations" of specific claims, Canada's position reflects neither the flexibility nor the remedial nature which the very wording of ***Outstanding Business*** demands. Canada's position effectively stultifies the Policy and certainly prevents its continued evolution as an instrument of justice and fairness in the resolution of claims. Most importantly, Canada's interpretation of the Policy is wilfully blind to the continuing evolution of Canada's lawful obligations to aboriginal peoples as articulated by the Supreme Court of Canada in cases since *Guerin*.

In our view, as we said in our reports on the McKenna-McBride application claims of the 'Namgis and Mamaleleqala First Nations, a claim falls within the Specific Claims Policy if (1) it is based on a cause of action recognized by the courts; (2) it is not based on unextinguished aboriginal rights or title; and (3) it alleges a breach of a legal or equitable obligation which gives rise to a claim for compensation or other relief within the contemplation of the Policy.

As to the first of these criteria, Canada argues that "there is no general fiduciary duty in relation to aboriginal interests in non-reserve lands" and "no general fiduciary obligation to protect traditional Indian settlement lands from the actions of other individuals or governments." Although we do not yet have the facts before us to determine whether a fiduciary duty was breached in this case, we do not see how, in the wake of *Delgamuukw*, the existence of a fiduciary duty with regard to the protection of aboriginal interests in traditional, non-reserve lands can be doubted. As Lamer CJ stated:

> First, aboriginal title encompasses within it a right to choose to what ends a piece of land can be put.... This aspect of aboriginal title suggests that the fiduciary relationship between the Crown and aboriginal peoples may be satisfied by the involvement of aboriginal peoples in decisions taken with respect to their lands. There is always a duty of consultation. Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified, in the same way that the Crown's failure to consult an aboriginal group with respect to the terms by which reserve land is leased may breach its fiduciary duty at common law: *Guerin*. The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith,

> and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.
>
> Second, aboriginal title, unlike the aboriginal right to fish for food, has an inescapably economic aspect, particularly when one takes into account the modern uses to which lands held pursuant to aboriginal title can be put.... Indeed, compensation for breaches of fiduciary duty are a well-established part of the landscape of aboriginal rights: *Guerin*. In keeping with the duty of honour and good faith on the Crown, fair compensation will ordinarily be required when aboriginal title is infringed. The amount of compensation will vary with the nature of the particular aboriginal title affected and with the nature and severity of the infringement and the extent to which aboriginal interests were accommodated.[53]

In our view, the cause of action alleged by the Kluane First Nation, if sustained by the evidence at a hearing on the merits, is one that has been recognized by the courts. Accordingly, we find that the First Nation has satisfied the first criterion for deciding whether a claim falls within the Specific Claims Policy.

As for the third criterion – "a breach of a legal or equitable obligation which gives rise to a claim for compensation or other relief within the contemplation of the Policy" – we believe, as we have already discussed, that the alleged cause of action, even if not founded on a breach of fiduciary obligation, can be sustained, given the requisite evidence, under the second and fourth categories of lawful obligation in *Outstanding Business*.

Having reached this conclusion, we must now determine whether the claim is "based on unextinguished aboriginal rights or title" such that it is to be excluded from consideration under the Specific Claims Policy by guideline 7.

Is the First Nation's Claim Excluded from the Specific Claims Policy by Guideline 7?

Part Three of *Outstanding Business* states:

> **GUIDELINES**
>
> In order to assist Indian bands and associations in the preparation of their claims the government has prepared guidelines pertaining to the submission and assessment of specific claims and on the treatment of compensation. While *the guidelines form an*

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[53] *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010 at 1113-14, Lamer CJ.

integral part of the government's policy on specific claims, they are set out separately in this section for ease of reference.

SUBMISSION AND ASSESSMENT OF SPECIFIC CLAIMS

Guidelines for the submission and assessment of specific claims may be summarized as follows:

...

7) *Claims based on unextinguished native title shall not be dealt with under the specific claims policy.*[54]

What is the meaning of guideline 7? According to Canada, when guideline 7 and the introduction to *Outstanding Business* are read together with the Specific Claims Policy as a whole, it is evident that claims based on traditional use and occupancy of land are not to be dealt with under the Policy, whereas claims based on breach of the *Indian Act* or breach of treaty form the Policy's *substance* and *can* be heard by the Commission.[55] The guideline, in Canada's view, is clear and unambiguous and precludes the First Nation from bringing this claim.[56] Since the paragraph headed "Guidelines" states that "the guidelines form an integral part of the government's policy on specific claims," counsel for Canada would have the Commission treat the guidelines as mandatory rather than merely directory in nature.[57] Moreover, since principles of interpretation direct that specific terms in a document will prevail over more general terms, in Canada's view the specific guideline 7 should therefore be given precedence over the more general concept of lawful obligation.[58]

In reply, the First Nation contends that "Guideline 7 is exactly that, it's a guideline"[59] – in other words, guideline 7 should be considered merely directory and, to the extent that it conflicts with the general characterization of lawful obligation in Part Two of *Outstanding Business*, Part Two should be paramount and, by implication, the guideline can be ignored.[60] The First Nation further asserts that, in any event, guideline 7 should not operate as a bar where a claim is based on a breach of lawful obligation and unextinguished native title is only incidentally involved in giving rise to the breach.[61] In the First Nation's view, Canada is seeking to have it both ways – first, by requiring the First Nation to prove unextinguished aboriginal title before Canada will accept that it might have an obligation to protect that interest, and then, once an assertion of aboriginal title is made, by arguing that the existence of aboriginal title takes the claim outside the Specific Claims Policy. In any event, guideline 7 may not apply to this case, according to counsel, because there has been no finding in law that the creation of the Parks has left the First Nation's interest in the Park lands unextinguished.[62]

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[54] *Outstanding Business*, 29-30; reprinted (1994), 1 ICCP 171 at 183-84. Emphasis added.

[55] ICC Transcript, September 12, 2000, pp. 77-78 (Aly Alibhai).

[56] Rebuttal Submission on Behalf of the Government of Canada, May 11, 2000, pp. 1 and 3.

[57] Written Submission on Behalf of the Government of Canada, March 31, 2000, p. 4; ICC Transcript, September 12, 2000, pp. 15 and 176 (Aly Alibhai).

[58] ICC Transcript, September 12, 2000, pp. 78-79 (Aly Alibhai).

[59] ICC Transcript, September 12, 2000, p. 131 (Dave Joe).

[60] Chief Bob Johnson, Kluane First Nation, to Dr John Hall, Research Manager – British Columbia and Yukon Territory, Specific Claims Branch – Vancouver, July 27, 1998.

The Commission has recently considered the legal effect of these guidelines in Part Three of the Specific Claims Policy in its report on the loss of use claim of the Long Plain First Nation. Although our attention in that case focused on guideline 3, we believe that the principles expressed there apply with equal force in the present circumstances. We stated:

> Part Three of the Specific Claims Policy, in which paragraph 3 is found, is, in any event, simply entitled "Guidelines." The use of that term suggests to us that, as a guideline, paragraph 3 is intended to be interpretive only. In fact, the introductory paragraph to the "Guidelines" suggests as much:
>
> > In order to assist Indian bands and associations in the preparation of their claims the government has prepared guidelines pertaining to the submission and assessment of specific claims and on the treatment of compensation. While *the guidelines form an integral part of the government's policy on specific claims*, they are set out separately in this section for ease of reference.[63]
>
> The "Guidelines" represent statements of policy and do not purport to define in an exhaustive manner the "legal principles" upon which compensation is to be determined. As noted previously, the wisdom and strength of the Specific Claims Policy is derived from its clear reliance upon "lawful obligation" as an evolving concept. In circumstances in which an analysis of the law leads to a clear conclusion that "loss of use" may be claimed as part of the "lawful obligation" owed by Canada to a First Nation, we are not prepared to elevate the "Guidelines" in *Outstanding Business* – especially ones of uncertain application such as paragraph 3 – to a position where they will override the clear application of the Specific Claims Policy.[64]

Is the present claim ***based on*** unextinguished native title? Canada's position would treat any claim involving aboriginal rights or title in the same manner, regardless of whether "unextinguished native title" is the real issue in the inquiry or a mere incident of the claim. We disagree with this position. In our opinion, where a claim involves a grievance arising out of Canada's *conduct* in a specific, isolated incident, the presence of unextinguished aboriginal rights or title is merely ***incidental*** to the overall claim. In such circumstances, in our view, the claim cannot be said to be ***based on*** unextinguished aboriginal rights or title and will not fall within the exclusive purview of the Comprehensive Claims Policy. The very essence of the Specific Claims Policy is the resolution of these types of historical grievances.

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[61] Written Submission on Behalf of the Kluane First Nation, April 20, 2000, para. 12.
[62] ICC Transcript, September 12, 2000, p. 106 (Dave Joe).
[63] *Outstanding Business*, 29; reprinted (1994), 1 ICCP 171 at 183. Emphasis added.
[64] ICC, *Long Plain First Nation Inquiry, Loss of Use Claim* (Ottawa, February 2000), 28-29; reported (2000) 12 ICCP 269 at 300.

Historical grievances of this nature are to be distinguished from cases in which the parties are exchanging undefined aboriginal land rights for concrete rights and benefits. In such cases, which turn on *the existence and content of aboriginal rights or title*, the claims can be said to be "***based on*** unextinguished native title" within the meaning of guideline 7, and on this basis they lie ***outside*** the Specific Claims Policy – meaning that the comprehensive claims process is clearly at play. Such claims are based upon unextinquished native title because they involve, at least to some extent, the surrender or relinguishment of all or some aspects of the First Nation's undefined aboriginal land rights – including perhaps the First Nation's traditional use and occupancy of some parts of the land – in exchange for the sort of concrete rights and benefits contemplated by agreements like the Yukon Umbrella Agreement and its band-specific final agreements.

We do not agree with Canada's contention that, just because the Commission draws a different line between comprehensive and specific claims than the one proposed by Canada, guideline 7 is thus rendered meaningless. The settlement of comprehensive claims is of undeniable importance in Canada, and it is certainly not the Commission's place to oversee the surrender and exchange of aboriginal rights in those negotiations. That being said, the resolution of historical grievances and past injustices arising out of Canada's conduct is the responsibility of the Commission and we see no reason why it should not be possible for the Commission to address issues of "outstanding lawful obligation" that involve ancillary issues of aboriginal rights and title. Finally, we wish to indicate that we do not believe it is in the interests of either Canada or the First Nation to have to resort to two different policies or forums to resolve their differences. If the parties can agree to address and resolve past injustices arising out of Canada's conduct within their comprehensive claims negotiations, neither the Commission nor the Specific Claims Policy need be engaged. However, as we have stated, we are not in a position to determine whether that is the case here; we find merely that the claim put forward by the Kluane First Nation is a specific claim within the meaning of that policy.

CONCLUSION

For the reasons set forth above, the Commission finds that the subject matter of the claim as alleged by the First Nation falls within the scope of the Specific Claims Policy. Accordingly, the Commission has jurisdiction to hear the claim. The parties are directed to submit all relevant documents to the Commission, and a planning conference to discuss the merits of the claim will be convened as soon as possible. The Commission remains ready to assist the parties wherever possible to find a resolution to this matter.

FOR THE INDIAN CLAIMS COMMISSION

P.E. James Prentice, QC Commission Co-Chair	Carole T. Corcoran Commissioner

Dated this 1st day of December, 2000.

INDIAN CLAIMS COMMISSION

INTERIM RULING: PEEPEEKISIS FIRST NATION INQUIRY FILE HILLS CLAIM

RULING ON GOVERNMENT OF CANADA OBJECTIONS

PANEL

Commissioner Sheila G. Purdy
Commissioner Renée Dupuis
Commissioner Alan Holman

COUNSEL

For the Peepeekisis First Nation
Tom Waller

For the Government of Canada
Uzma Ihsanullah

To the Indian Claims Commission
Kathleen N. Lickers

NOVEMBER 2001

BACKGROUND

The Indian Claims Commission has considered Canada's request that it reconsider its September 14, 2001, decision to accept jurisdiction to proceed with its inquiry into the Peepeekisis First Nation's specific claim regarding the File Hills Colonization Scheme. The basis for Canada's request was first articulated at the second planning conference of October 10, 2001, and then set out in greater detail by letter of October 16, 2001. After careful examination of the matter, the Commission has decided that it will not reconsider its decision of September 14, 2001. The reasons for this decision follow.

By its letter of October 16, 2001, Canada submits that it did not have the opportunity to make submissions on the matter of the Commission's authority to proceed with its inquiry in the absence of a formal rejection by the Minister of Indian Affairs. The chronology of events and Canada's own statements during the Commission's initial proceeding by way of planning conferences, however, suggest otherwise.

First, during the initial planning conference of July 24, 2001, the parties discussed the question of the Commission's mandate to proceed in the absence of a letter of rejection from the Minister. According to the planning conference summary provided to the parties, Canada decided that it would not formally raise a mandate challenge at the time but that it would not actively participate in the inquiry until the Minister's position was delivered. The summary also noted that the parties agreed to submit written submissions regarding the Commission's jurisdiction to proceed, in the absence of a formal rejection, by August 10, 2001. Both the First Nation and Canada accepted that the Commission's counsel would submit the matter to the Commission for a decision. The First Nation's position was sent to the Commission on August 9, 2001; Canada responded to these submissions by letter on August 17, 2001. Canada did not address the arguments raised by the First Nation but instead set out the position that it "does not object to the ICC conducting an inquiry in this matter" and would attend as observers only.

Second, notwithstanding its decision to observe the process, Canada did participate in the discussions at the two planning conferences of July 24 and October 10, 2001, respectively. In particular, it discussed the matters at issue before this Commission and had the opportunity on at least both these occasions to indicate formally its position regarding the Commission's mandate. At no time, however, did Canada identify the Commission's mandate to proceed as an issue in dispute (as evidenced by the statement of issues established during the second planning conference). The panel is content that Canada participated at least to some extent in the process, and at the very least, did not object to the process.

Third, after the summaries of the two planning conferences were sent to the parties, Canada did not express disagreement with the content of those summaries respecting Canada's position on the mandate challenge. Nor did Canada object to providing its statement of position on the question of the Commission's mandate by August 10, 2001.

Although Canada reserved its right to proceed with a mandate challenge, it did not. In fact, in its August 17, 2001, letter, Canada stated its position explicitly: "To clarify, Canada does not object to the ICC conducting an inquiry in this matter." The panel reads this sentence to be unequivocal.

Fourth, Canada has not presented any new arguments or facts in support of its request that we reconsider our decision of September 14, 2001. Its October 16 letter merely stated that "Canada did not participate" in the ICC's September 14 decision to proceed with the inquiry, nor did it have "an opportunity to present its arguments regarding this issue." We find those statements surprising and unconvincing, given the documentary record to date.

Finally, at no time prior to delivering its August 17, 2001, letter, did Canada request additional time to provide supplementary arguments in support of its position. Furthermore, Canada did not, at any time during the discussions of the parties, raise new objections to the holding of the inquiry, notwithstanding many opportunities to do so.

RULING

In our view, Canada has had the opportunity to be heard. Moreover, upon being formally invited, it agreed to disclose its position on the mandate question, which it did by letter of August 17, 2001. Canada, as well as the

First Nation, is free to choose the manner in which it presents its position and the arguments in support of that position. The written arguments of Canada and the First Nation were provided to the panel, and we gave them serious consideration prior to making a decision.

In closing, the duty of fairness does not require that the Commission provide an oral hearing of the issue. To the extent that the parties are given an opportunity to present their arguments in writing, the duty of fairness has been met. We believe the duty was met in this case.

FOR THE INDIAN CLAIMS COMMISSION

	Renée Dupuis	
Sheila G. Purdy Commissioner	Renée Dupuis Commissioner	Alan Holman Commissioner

Dated this 28th day of November, 2001.

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INDIAN CLAIMS COMMISSION

INTERIM RULING
CANUPAWAKPA DAKOTA FIRST NATION INQUIRY
TURTLE MOUNTAIN SURRENDER CLAIM

RULING ON FIRST NATION'S OBJECTION

PANEL

Commission Co-Chair Daniel J. Bellegarde
Commissioner Sheila G. Purdy
Commissioner Roger J. Augustine

COUNSEL

For the Canupawakpa Dakota First Nation
Paul Forsyth

For the Government of Canada
Uzma Ihsanullah

To the Indian Claims Commission
Kathleen N. Lickers

NOVEMBER 2001

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BACKGROUND

This preliminary ruling concerns an objection raised by the Canupawakpa Dakota First Nation ("Canupawakpa" or the "First Nation") to Canada's request to introduce new or additional issues into the inquiry by the Indian Claims Commission (the "Commission") into the First Nation's rejected specific claim.

This claim was first submitted to Specific Claims West, Department of Indian Affairs and Northern Development (DIAND), in April 1993, by Canupawakpa (known as Oak Lake First Nation at the time), on behalf of the successors or descendants of the Turtle Mountain Band of Indians. The claim relates to a surrender taken by Canada in 1909 of all of the reserve lands that had been set apart for the Turtle Mountain Band in southwest Manitoba. Around the time of the surrender, many of the band members dispersed to the neighbouring band of Oak Lake, now Canupawakpa, while others joined the Bird Tail, Dakota Tipi, Sioux Valley, and Dakota Plains Bands, all in Manitoba. To date, the Sioux Valley Dakota First Nation (Sioux Valley) is the only First Nation to come forward claiming a beneficial interest. As a result of discussions with Canupawakpa, Sioux Valley has agreed to be represented in this inquiry by Canupawakpa's legal counsel.

The claim challenges both the validity of the surrender – specifically, whether ineligible voters participated in the vote – and Canada's conduct over time leading up to the surrender of the reserve land. The claim was rejected by Canada in January 1995. At the invitation of Canada, the First Nation requested a more detailed explanation of the rejection in April 1995 and received same in August 1995. The parties also held a meeting in the community in December 1997 to discuss the basis of Canada's rejection; however, Canada did not alter its position. In May 2000, the First Nation requested that the Commission inquire into the rejection of this claim.

At a first planning conference convened by the Commission in October 2000, Canada raised three new issues that had not been raised with the First Nation while the claim was in the specific claims process. They were described as follows:

1 Is the current claimant band entitled to bring this claim on behalf of the former Turtle Mountain families?
2 Are there other potential beneficiaries of this claim who should be participating or represented in this inquiry?
3 Were the Turtle Mountain families a band, according to the *Indian Act*, RSC 1906, c. 81?

The First Nation objected to Canada's request to introduce new issues into the Commission's review of the rejected claim and asked Canada to clarify its position. By conference call in December 2000, the issues surrounding validity of surrender were finalized but the question of the "additional issues" remained outstanding. By February 2001, Canada had clarified its position on these issues and reconfirmed its request to include them in the inquiry. It also added a fourth issue, included by the First Nation in its original claim but deemed by Canada to be an unnecessary question for the purpose of rejecting the claim:

4 Was Turtle Mountain Indian Reserve No. 60, also known as Section 31-1-22W, constituted and set aside by Canada as a Reserve within the meaning of the *Indian Act*, RSC 1906, c. 81?

The same month the parties met again at a second planning conference. With respect to question 2 above, they agreed that, as other potential beneficiaries are identified, they would be afforded the opportunity to participate in the inquiry to the extent that the Commission deemed it reasonable and necessary. The parties did not reach agreement on questions 1, 3, or 4. They therefore asked the Commission to rule on whether Canada should be permitted to raise these issues in the inquiry.

The First Nation's submissions on the matter were received in late February 2001. Before Canada's response was delivered, however, its counsel wrote to the Commission and the First Nation on April 9, 2001, stating:

> This is to advise you that Canada is formally withdrawing its request to introduce the three additional issues in this inquiry, as outlined in my letter of February 9, 2001. Consequently, we will not be responding to the Canupawakpa Dakota First Nation's submission of February 27, 2001. *However, the issue of Canupawakpa Dakota First Nation and the Sioux Valley Dakota First Nation's status as beneficiaries of this claim is still one of concern to Canada and we do not concede that either First Nation has a beneficial interest in this claim. At this time, my client is considering how best to address this concern.*
>
> *Given the unusual circumstances of this situation, we are prepared to proceed with the inquiry into the merits of the surrender validity claim, on the basis that the Canupawakpa Dakota First Nation is an interested party as the recipient of a rejection letter.*[1]

Clearly, Canada was prepared to proceed only on the purely technical ground that the First Nation, as the recipient of a rejection letter, was legally entitled to convene an inquiry, but without any acknowledgement that the First Nation was correct in its position regarding the merits of the three withdrawn issues.

During a further conference call with the parties on April 27, Canada elaborated on its position outlined in the April 9 letter. According to counsel, even if the Commission should recommend the claim's acceptance for negotiation, it would still be open to the Minister of Indian Affairs to reject that recommendation on the substantive ground that Canupawakpa does not have a beneficial interest in the former reserve lands of the Turtle Mountain Band.[2] For this reason, neither the First Nation nor the Commission was satisfied that the issue regarding the standing of Canupawakpa to advance this claim had been fully withdrawn. Counsel for Canada further advised that the Minister would communicate directly with the First Nation on the matter.

On May 29, counsel for Canada wrote to counsel for the Commission and the First Nation indicating that, in Canada's view, it had

> properly withdrawn the issue of the First Nation's beneficial interest in this claim from this inquiry. Since the First Nation has not requested that the ISCC [Indian Specific

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[1] Uzma Ihsanullah, Counsel, DIAND Legal Services, Department of Justice, to Kathleen Lickers, Commission Counsel, ICC, and Paul Forsyth, Legal Counsel, Canupawakpa Dakota First Nation, April 9, 2001. Emphasis added.

[2] Kathleen Lickers, Commission Counsel, ICC, to Paul Forsyth, Legal Counsel, Canupawakpa Dakota First Nation and Uzma Ihsanullah, Counsel, DIAND Legal Services, Department of Justice, April 30, 2001.

> Claims Commission] consider this issue, and Canada has withdrawn its request, the question is not before the ISCC. The First Nation's objection to Canada's introduction of the issue of beneficial interest is, in our view, moot. *However, it is our position that the issue remains outstanding as between Canada and the First Nation.*[3]

At a third planning conference in July 2001, the First Nation repeated its request that the Commission rule on whether Canada should be permitted to challenge the First Nation's standing at this juncture, and followed up with further written submissions. Canada reiterated in writing its position that the issue was moot and there was "no live issue on which the ICC can rule."[4]

By letter dated July 27, 2001, the Minister of Indian Affairs and Northern Development, the Honourable Robert D. Nault, wrote to the First Nation stating that, as the result of a further legal review by the Department of Justice, the claim was being rejected on an additional ground – namely, that the First Nation "has not demonstrated that it has the beneficial interest in the Turtle Mountain Surrender claim." The Minister explained that the "Specific Claims policy does not allow for claims by individuals, nor does it contemplate claims by any but the band which suffered the grievance and/or damages." In Canada's view, since the original band no longer exists and the members who dispersed to separate bands could not take with them any collective rights, Canupawakpa has no beneficial interest in the claim. The Minister then invited the First Nation to bring this issue before the Commission for a "substantive discussion." He also pointed out that, although the issue of Canupawakpa's beneficial interest had not been raised as a ground for rejection in the January 1995 rejection letter, this had been Canada's "preliminary" position only:

> It was not viewed as necessary to consider every possible ground for the rejection of the claim, nor did we wish to lengthen the review process by addressing issues which were moot.[5]

Canada's legal counsel followed up soon afterward with a suggestion that the parties use the Commission's mediation services to resolve the matter. Canupawakpa Chief Noella Eagle rejected this offer and requested that the

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[3] Uzma Ihsanullah, Counsel, DIAND Legal Services, Department of Justice, to Kathleen Lickers, Commission Counsel, ICC and Paul Forsyth, Legal Counsel, Canupawakpa Dakota First Nation, May 29, 2001. Emphasis added.

[4] Uzma Ihsanullah, Counsel, DIAND Legal Services, Department of Justice, to Kathleen Lickers, Commission Counsel, ICC, and Paul Forsyth, Legal Counsel, Canupawakpa Dakota First Nation, July 9, 2001.

[5] Robert D. Nault, Minister of Indian Affairs and Northern Development, to Noella Eagle, Chief, Canupawakpa Dakota First Nation, July 27, 2001.

Commission render a decision on the basis that its "response will determine the future course of this claim ...."[6] The Chief also replied to the Minister's letter, reaffirming the First Nation's resolve to carry through with this claim before the Commission.[7] Commission counsel advised the parties by letter on August 31, 2001, however, that the panel, having met to discuss Canada's request to mediate the issue, did not have a clear understanding or sufficient information to decide the matter:

> This is a matter which, based upon Canada's stated position, affects the substantive rights of the Canupawakpa First Nation to proceed toward the resolution of its claim. Further, the Commissioners have understood the Honourable Minister's July 27, 2001 letter to be unequivocal. As such, it is unclear what matter Canada would refer to mediation.[8]

By conference call on September 7, 2001, the parties agreed to proceed by way of written submissions and waived an oral hearing before the panel. Before the submissions were tendered, however, the parties, with the assistance of the Commission's legal counsel, were able to reach a consensus on three of the four outstanding issues. With respect to the second issue, the parties agreed to permit any other potential beneficiaries to participate, as the Commission deems reasonable and necessary. The parties further agreed that the third issue had been withdrawn by Canada's letter of February 9, 2001, and that the fourth issue should be addressed in the inquiry before the Commission. It should be noted that the fourth issue had first been raised by the First Nation in its original claim. Canada, however, deemed it to be a question that was unnecessary to answer for the purposes of its 1995 rejection.

The exchange of submissions was completed by October 19 and the panel agreed to make its oral ruling by October 26, with reasons to follow, to take into consideration the fact that the First Nation's community session, in which the testimony of elders and other community members was to be received by the panel, was scheduled to take place on October 30 and 31 at the reserve. The panel determined that it had sufficient information in the parties' written submissions to make its ruling without the necessity of requiring the parties to appear before it.

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[6] Noella Eagle, Chief, Canupawakpa Dakota First Nation, to Kathleen Lickers, Commission Counsel, ICC, August 9, 2001.

[7] Noella Eagle, Chief, Canupawakpa Dakota First Nation, to Robert D. Nault, Minister of Indian Affairs and Northern Development, August 8, 2001.

[8] Kathleen Lickers, Commission Counsel, ICC, to Paul Forsyth, Legal Counsel, Canupawakpa Dakota First Nation, and Uzma Ihsanullah, Counsel, DIAND Legal Services, Department of Justice, August 31, 2001.

For the purpose of this ruling, therefore, the panel will address only Issue 1, the question of the entitlement of this First Nation to bring this claim forward on behalf of the successors or descendants of the former Turtle Mountain Band.

It should also be pointed out that Canupawakpa is making its submissions on behalf of itself and Sioux Valley. Since Sioux Valley only recently became a participant in this matter and was therefore not referenced in many of the documents, we will refer to Canupawakpa only in our ruling; however, it is understood by the panel that its findings apply equally to Sioux Valley, and may also be applicable to any other potential beneficiaries who come forward.

ISSUE

Is the current claimant band entitled to bring this claim on behalf of the former Turtle Mountain families?

RULING

The panel is of the view that the parties' positions can be adequately canvassed by answering the following questions:

(a) Does the Commission's mandate permit it to accept new or additional issues from either party that were not raised by that party prior to the Commission's review of the rejected claim?

(b) If the Commission is permitted to deal with new or additional issues, is Canada nevertheless estopped or otherwise prevented from introducing at this time the issue that Canupawakpa Dakota First Nation is not a proper claimant and therefore does not have a beneficial interest in this claim?

RULING (A)

Does the Commission's mandate permit it to accept new or additional issues from either party that were not raised by that party prior to the Commission's review of the rejected claim?

The First Nation makes it clear that it is the timing of the introduction of the issue challenging Canupawakpa's standing to bring the claim, not the issue itself, that is the central problem.[9]

Throughout the entire specific claims process, states the First Nation, from the filing of the claim in 1995 to letters and ongoing discussions culminating in the meeting with the community in December 1998, Canada never once raised the concern that Canupawakpa Dakota First Nation was not entitled to bring this claim in the first place.[10]

> There was never any pretence or ambiguity in respect of the nature of the Specific Claim being advanced by the First Nation on behalf of those who suffered a loss as a result of the improprieties by Canada in respect of the taking of the reserve lands. Eight years have passed since the Specific Claim was submitted to Canada for analysis and legal opinion. For Canada to suggest for the first time now that the Commission should even consider this matter as a basis for Canada's rejection of the Specific Claim, is an abuse not only of the Commission's mandate, but of the Specific Claims process in general.[11]

The Commission's mandate to conduct inquiries pursuant to the *Inquiries Act* is set out in a commission issued on September 1, 1992. It directs

> that our Commissioners on the basis of Canada's Specific Claims Policy ... by considering only *those matters at issue when the dispute was initially submitted to the Commission*, inquire and report on:
>
> (a) whether a claimant has a valid claim for negotiation under the Policy where that claim has already been rejected by the Minister....[12]

As such, argues the First Nation, the Commission is precluded by its mandate from entertaining a new issue that was not a matter at issue when the First Nation asked the Commission to review its rejected claim.[13]

Canada does not disagree that the issue sought to be introduced into the inquiry was raised for the first time prior to the first planning conference on October 17, 2000.[14] Nevertheless, argues Canada, given the second rejection letter in July 2001 that adds the First Nation's lack of entitlement to bring this claim on behalf of the successors or descendants of the Turtle Mountain Band to the grounds for rejecting the claim, this issue now fits squarely within the Commission's mandate as a reviewable ground of rejection.[15]

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[9] Submission on Behalf of Canupawakpa Dakota First Nation, February 27, 2001, para. 16; Reply Submission on Behalf of Canupawakpa Dakota First Nation, October 18, 2001, para. 23.

[10] Submission on Behalf of Canupawakpa Dakota First Nation, February 27, 2001, para. 4.

[11] Submission on Behalf of Canupawakpa Dakota First Nation, February 27, 2001, para. 16.

[12] Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991 (Consolidated Terms of Reference). Emphasis added.

[13] Submission on Behalf of Canupawakpa Dakota First Nation, February 27, 2001, para. 12.

[14] Responding Submission of the Government of Canada, October 5, 2001, para. 12.

Canada raises the Commission's description of its mandate as a remedial one, citing the Commission's May 2, 2000, interim ruling in James Smith Cree Nation[16] for the proposition that a piecemeal approach to an inquiry, by refusing to consider new issues introduced by the First Nation, could unduly delay the resolution of all parts of a claim and cause unfairness to the First Nation.[17] By calling into question whether Canupawakpa is a proper claimant, Canada, by its own admission, is now raising a serious obstacle to a final resolution in the event that the Commission recommends acceptance of the claim.[18] Canada argues, therefore, that, in fairness to both parties and to allow a proper analysis of the claim, all issues that "are in dispute between the parties" should be addressed at the same time.[19] Finally, Canada suggests that the Commission is compelled to ensure that it is dealing with the proper claimant or claimants, now that Canada has raised the First Nation's lack of status and entitlement to bring the claim as a "disputed ground of rejection."[20]

In its reply, the First Nation points out that if, as Canada suggests, the duty of fairness and the remedial nature of the Commission's mandate are to govern in any procedural question, they must favour the First Nation in these circumstances. Given that Canada created the rules for the Specific Claims Policy and the mandate for the Commission, and retains the authority to make the final decision on accepting or rejecting a claim, these rules and principles should be construed strictly against Canada.[21] The First Nation distinguishes the Commission's ruling in James Smith Cree Nation on the basis that the issue sought to be introduced by Canada in this case is a threshold issue that seeks to defeat the entire claim.[22]

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[15] Responding Submission of the Government of Canada, October 5, 2001, para. 21.

[16] ICC, "Interim Ruling: James Smith Cree Nation Inquiries, Treaty Land Entitlement and Peter Chapman IR 100A Reserve Claims," May 2, 2000, see above 71.

[17] ICC, "Interim Ruling: James Smith Cree Nation Inquiries: Treaty Land Entitlement and Peter Chapman IR 100A Reserve Claims," May 2, 2000, see above at 73; at tab 1 in Responding Submission of the Government of Canada, October 5, 2001, para. 27.

[18] Responding Submission of the Government of Canada, October 5, 2001, para. 26.

[19] Responding Submission of the Government of Canada, October 5, 2001, para. 27.

[20] Responding Submission of the Government of Canada, October 5, 2001, para. 29.

[21] Reply Submission on Behalf of Canupawakpa Dakota First Nation, October 18, 2001, para. 22.

[22] Reply Submission on Behalf of Canupawakpa Dakota First Nation, October 18, 2001, para. 23.

The panel agrees with Canada to the extent that the Commission interprets its mandate in a broad and remedial manner. As the Commission stated in its inquiry into the claim of the Lax Kw'alaams Indian Band:

> On an ordinary reading of our Orders in Council, we have concluded that the Commission's mandate is remedial in nature and that it has a broad mandate to conduct inquiries into a wide range of issues which arise out of the application of Canada's Specific Claims Policy. In our view, this Commission was created to assist the parties in the negotiation of specific claims. This interpretation is supported by a statement by Minister Tom Siddon, as he then was, in which he suggested that the Commission's mandate is not strictly limited to the four corners of the Specific Claims Policy.[23]

On the facts of the James Smith interim ruling, the original submission to DIAND on the treaty land entitlement claim had been lost, resulting in uncertainty as to whether the issues of lands occupied prior to treaty and land quality had been included. Moreover, the issue of unalienated mineral rights in the Peter Chapman IR 100A claim was raised for the first time before the Commission. In addressing these issues, the Commission pointed out an important qualification governing its mandate: "[b]y interpreting our mandate in this remedial manner we are mindful that *each claim must be viewed in its own unique circumstances.*"[24] As Canada points out, the Commission also expressed its concern in that ruling about a multiplicity of proceedings and greater delay if the first two issues were to be sent back through the initial specific claims process. The Commission concluded that fairness to the First Nation dictated that lands occupied prior to treaty, land quality, and mineral rights should be disposed of in the inquiry rather than piecemeal. Given that Canada had not researched these issues, however, the Commission ruled that, in fairness to Canada, it would accommodate Canada's need for additional research and preparation time.

Therefore, in answer to question (a) above, the panel confirms that it has the mandate to accept new or additional issues from either party, subject to the qualification that each claim must be viewed in its own unique circumstances. Although to date the Commission has dealt only with mandate challenges regarding new issues in situations in which the First Nation, not Canada, is seeking to raise new matters, the panel views the principles that it espoused in the L̲ax Kw'a̲laams report and the James Smith ruling to be applicable to Canada. The panel, however, agrees with the First Nation that, in applying the principle of fairness to the parties, the Commission must take into account that the design of the Specific Claims Policy, the mandate of the Commission, and the ultimate authority to validate claims were and are solely within the purview of Canada.

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[23] ICC, *Lax Kw'alaams Indian Band Inquiry* (Ottawa, June 1994), reported (1995) 3 ICCP 99 at 158.

[24] ICC, "Interim Ruling: James Smith Cree Nation Inquiries: Treaty Land Entitlement and Peter Chapman IR 100A Reserve Claims," May 2, 2000, see above 72; at tab 1 in Responding Submission of the Government of Canada, October 5, 2001, para. 27.

RULING (B)

If the Commission is permitted to deal with new or additional issues, is Canada nevertheless estopped or otherwise prevented from introducing at this time the issue that Canupawakpa Dakota First Nation is not a proper claimant and therefore does not have a beneficial interest in this claim?

The panel comes to the critical question in this ruling: whether Canada should be estopped from raising the issue of Canupawakpa's standing as a proper claimant.

The First Nation points out that there is a fundamental difference between raising new issues at the Commission's review stage relating to an aspect of the claim, and raising a "threshold issue" going to the very heart of the First Nation's right to advance this specific claim in the first place. The First Nation, however, concedes that,

> while the question of whether a First Nation is a proper claimant under the Specific Claims Policy might be a necessary question to address when the claim is filed and responded to by Canada, such is not a necessary question at this stage of the Inquiry, nor is it a proper question.[25]

The First Nation states that at no time since this claim was commenced in 1993 has Canada ever raised the issue of the propriety of this First Nation to pursue its claim – not in letters, discussions, the Minister's rejection letter of 1995, or in Canada's meeting in the community in December 1997 – until after the commencement of the review of the rejected claim by the Commission in May 2000.

By not raising this issue during the past eight years, argues the First Nation, Canada "positively represented to the First Nation that it was entitled to advance the claim within the Specific Claims process,"[26] both on its own behalf and on behalf of the successors of the Turtle Mountain Band. Counsel contends that, at all times, the First Nation acted on the positive representations of Canada that this First Nation was a proper claimant.

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[25] Reply Submission on Behalf of Canupawakpa Dakota First Nation, October 18, 2001, para. 1.

[26] Reply Submission on Behalf of Canupawakpa Dakota First Nation, October 18, 2001, para. 3.

Of importance is the contention, undisputed by Canada, that the First Nation at all times acted honestly and in good faith. For example, the draft legal and factual questions submitted by the First Nation in 1993 indicate clearly that the First Nation was bringing this claim on behalf of the successors of the Turtle Mountain Band.[27] Counsel for the First Nation also refers the panel to the parties' correspondence to permit us to better appreciate the extent to which Canada's representations to the First Nation were affirmed and entrenched in their dealings. The panel is not required to review this correspondence, however, as Canada's letter of October 17, 2000, the Minister's letter of rejection of July 27, 2001, and Canada's submissions all accord with the First Nation's understanding of the history on this point.

In further reliance on Canada's representations, the First Nation states that over eight years it has expended funds and time to its detriment in pursuing this claim, in the "legitimate expectation" that it was entitled to do so.[28] As a result, says the First Nation, this matter fits squarely within the doctrine of estoppel and Canada should be denied the opportunity to argue that the First Nation is not or cannot be a claimant.

Canada, while acknowledging that this issue is being raised for the first time, nevertheless argues that it has been properly raised by having been included in a second letter of rejection, and therefore, as a question of fairness to Canada, must be argued on its merits before the Commission. Canada then introduces the argument that it would make before the panel if permitted by this ruling. The First Nation, on the other hand, maintaining that Canada should be estopped or otherwise prevented from even raising the issue of who is a proper claimant, therefore has not attempted to respond to Canada's position on the legal interpretation of beneficiaries in land claims.

Canada refers to recent jurisprudence, in particular the Federal Court Trial Division and Court of Appeal judgments on the issue of damages in the *Blueberry River Indian Band v. Canada* case (known as *Apsassin*),[29] on the basis that

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[27] Reply Submission on Behalf of Canupawakpa Dakota First Nation, October 18, 2001, para. 4. The Draft Legal and Factual Questions are found at Tab H in Submission on Behalf of Canupawakpa Dakota First Nation, February 27, 2001.

[28] Reply Submission on Behalf of Canupawakpa Dakota First Nation, October 18, 2001, para. 10.

[29] *Blueberry River Indian Band v. Canada*, [1999] FCJ No. 452 (FCTD), affirmed [2001] FCJ No. 725 (FCA), leave to appeal dismissed [2001] SCCA No. 272 (SCC).

> this jurisprudence assists in our interpretation of the Specific Claims policy, especially in light of the limitation that only *Indian Act* bands can bring forward claims under the Specific Claims policy. Moreover, only the band which suffered the grievance and the loss can be a claimant under the policy.[30]

As a result of this decision and the facts of this claim, says Canada, it now has "serious concerns regarding whether [Canupawakpa and Sioux Valley] are proper claimants to this claim under the Specific Claims policy."[31] Canada in fact warns the First Nation that, if the Commission recommends acceptance of the claim for negotiation, this concern will present a "significant obstacle" to Canada accepting the claim. The solution, says Canada, is to argue before the Commission whether Canupawakpa was a rightful claimant in the first place and have the Commission make its recommendations, "which will assist Canada in overcoming its concerns."[32]

The panel has not yet had the benefit of hearing all the facts of this claim. It is therefore not in a position either to agree or disagree with the parties' representations of any facts in dispute. Nevertheless, it appears abundantly clear to the panel that Canada has represented to the First Nation throughout the claims' process that this First Nation could properly bring its claim. It must have done so having regard to its own policy and having determined that this First Nation fit within it.

The panel notes that Canada did not base its argument on having recently found historical evidence that was not available to it during the eight years that it was processing and rejecting the claim. Further, Canada does not dispute the First Nation's contention that it has always acted honestly and "without subterfuge or attempt to mislead"[33] in the processing of its claim. Had new facts come to light to indicate that the wrong claimant is before us and the right claimant is not, the panel may well have been persuaded to hear the parties' arguments on the issue. This, however, is not the case. Nothing has been uncovered that would cast into doubt Canada's assumption from the outset that Canupawakpa was a proper claimant.

In fact, Canada appears to be arguing *not* that the wrong claimant is before the Commission but that there are *no* rightful claimants. The panel finds it extraordinary that Canada now seeks to exclude from its Specific Claims Policy an historical grievance in which a band allegedly ceased to exist and its members departed for other bands as a direct consequence of Canada's unlawful conduct. Moreover, at the same time that Canada now raises its objection to the status of Canupawakpa as a claimant band, it has requested and obtained agreement from the First Nation to add Sioux Valley and any other "potential beneficiaries of this claim" who come forward. For what purpose, we might ask, did Canada do this if it intends to interpret its policy to exclude all potential beneficiaries of this claim.

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[30] Responding Submission of the Government of Canada, October 5, 2001, para. 31.

[31] Responding Submission of the Government of Canada, October 5, 2001, para. 45.

[32] Responding Submission of the Government of Canada, October 5, 2001, para. 45.

[33] Reply Submission on Behalf of Canupawakpa Dakota First Nation, October 18, 2001, para. 4

The First Nation cites a number of authorities in support of the applicability of estoppel in this case. Estoppel refers to "a doctrine by which a person may be precluded by his act or conduct, or silence when it is his duty to speak, from asserting a right which he otherwise would have had."[34] The First Nation also quotes from *Canadian Labour Arbitration* as follows:

> Thus, the essentials of estoppel are: a finding that there was a representation by words or conduct, which may include silence, intended to be relied on by the party to which it was directed; some reliance in the form of some action or inaction; and detriment resulting therefrom.[35]

In addition, the panel relies upon the review of the estoppel doctrine by Peter Hogg and Patrick Monahan in *Liability of the Crown*:

> the Crown is bound by the law of estoppel; a representation by the Crown will raise an estoppel against the Crown if the other ingredients of estoppel are present. However, a representation, like a contract, will bind the Crown only if it is (1) within the power of the Crown itself, and (2) made by a servant of the Crown within the scope of his or her authority.[36]

The authors go on to quote with approval the 1965 Supreme Court of Canada case *Re Violi*[37] for the proposition that, although estoppel cannot prevent a government body from exercising a statutory discretion, when the Crown, by its conduct and in the exercise of its discretionary power, ***leads an***

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[34] *Black's Law Dictionary*, 6th ed. (1990), 551, in Reply Submission on Behalf of Canupawakpa Dakota First Nation, October 18, 2001, para. 7.

[35] *Canadian Labour Arbitration*, 3rd ed. (Brown & Beatty), 2–68, in Reply Submission on Behalf of Canupawakpa Dakota First Nation, October 18, 2001, para 9.

[36] P.W. Hogg and P.J. Monahan, *Liability of the Crown*, 3rd ed. (Scarborough: Carswell, 2000), 261.

[37] [1965] SCR 232.

individual to believe that a decision has been made, it is to be treated as having made that decision.[38]

There is no doubt, in the panel's view, that Canada's silence and related conduct over eight years on the issue of whether Canupawakpa was a proper claimant, was *intended* to be relied on and *was* relied on by the First Nation. Otherwise, it surely would have considered the alternatives of not pursuing the claim under the Specific Claims Policy or of pursuing it in the courts.

Did the First Nation rely to its detriment on Canada's representation by conduct? The First Nation states that over the eight years it expended funds and time in pursuance of its claim. On that point, the panel can accept without formal proof that the First Nation must have expended considerable time, energy, and its own money on this claim, costs that would not be fully recoverable even if the First Nation were to pursue its claim successfully in the courts. Moreover, the loss of time, eight years, may never be fully made up if the First Nation's ability to marshall its case depends in part on the testimony of elders.

The panel finds that the prerequisites for estoppel have been met on the facts of this claim. Moreover, it is not argued by Canada that the representations made by Canada to the First Nation were not within its power or were not made by servants of the Crown acting within their authority.

Canada, however, argues that the1995 rejection letter was clearly a "preliminary" decision only, was therefore equivocal, and was always open to further review. Canada also points to a statement in the same letter that purports to permit further evidence or argument to be presented for review, presumably by either party, before a final position is taken. The statement reads:

> Our position is preliminary *in the sense that it will be discussed with you*. We will review any further evidence or arguments that may be presented before a final position is taken by the Government of Canada.[39]

The panel agrees with the First Nation that, on a plain reading of this statement, it means that the government had made a decision rejecting the claim, but was inviting the First Nation to meet with officials and to present further evidence or arguments to support its case before Canada made a final decision. In this case, the First Nation did meet and communicate with Canada in furtherance of this invitation but ultimately Canada did not revise its position. When coupled with the statement in the same letter that "the band has the option to submit a rejected claim to the Indian Specific Claims Commission and request ... *an inquiry into the reasons for the rejection*," there is little doubt that Canada expected the First Nation to act in reliance on the stated grounds for rejection in the letter. The panel concludes that, on the facts of this case, the "preliminary decision" became a final decision when Canada did not amend it within a reasonable time after the follow-up discussions. In these circumstances, five years was not a reasonable amount of time.

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[38] P.W. Hogg and P.J. Monahan, *Liability of the Crown*, 3rd ed. (Scarborough: Carswell, 2000), 263. Emphasis added. See also the reference to *Commonwealth of Australia v. Verwayen*, (1990) 170 CLR 394 (HC Aust.), for the application of estoppel to a change in government policy.

[39] Submission on Behalf of Canupawakpa Dakota First Nation, February 27, 2001, tab C, Jack Hughes, Research Manager, Specific Claims West, Indian and Northern Affairs, to Alvina Chaske, Chief, Oak Lake Sioux First Nation, January 23, 1995. Emphasis added.

Canada maintains that, "in coming to a discretionary policy decision which was not final in any sense, the Minister was entitled to review his decision and to articulate additional grounds for rejection of the claim."[40] Hogg and Monahan state, however, that the doctrine of estoppel provides a shield, such that "it disables the representor from acting inconsistently with an earlier, relied-upon decision."[41] In this case, the decision relied on by the First Nation to its detriment was the final, unstated decision of departmental officials who, in assessing the merits of the claim, determined that Canupawakpa was a proper claimant.

That Canada should now be permitted to challenge the First Nation's status and entitlement to bring this claim would cause serious prejudice to the First Nation. This is a threshold issue that would bring an end to the claim in the specific claims process if Canada were successful. As such, Canada is estopped from introducing the issue that Canupawakpa does not have a beneficial interest in this claim and is therefore not a proper claimant.

We conclude by agreeing with the First Nation that raising the issue at this time offends the principle of fairness by which the Commission attempts to conduct its proceedings. Any unfairness resulting to Canada would be minimal compared to the inequity of forcing the First Nation to defend its standing now.

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[40] Responding Submission of the Government of Canada, October 5, 2001, para. 64.
[41] P.W. Hogg and P.J. Monahan, *Liability of the Crown*, 3rd ed. (Scarborough: Carswell, 2000), 261.

It goes without saying that Canada is never barred from accepting a rejected claim or otherwise changing its position in favour of the First Nation. But where Canada attempts to erect new barriers that would defeat a First Nation's claim, as has happened here, the Commission is not prepared to countenance such actions.

FOR THE INDIAN CLAIMS COMMISSION

Daniel Bellegarde   Sheila Purdy   Roger Augustine

Daniel J. Bellegarde Commission Co-Chair	Sheila G. Purdy Commissioner	Roger J. Augustine Commissioner

Dated this 9th day of November, 2001.

INDIAN CLAIMS COMMISSION

JAMES SMITH CREE NATION INQUIRY CHAKASTAYPASIN IR 98 SURRENDER CLAIM

RULING ON FIRST NATION'S OBJECTION

INTERIM RULING
OTHER HOST BANDS' PARTICIPATION

PANEL

Commissioner Renée Dupuis
Commissioner Roger J. Augustine
Commissioner Alan Holman

COUNSEL

For the James Smith Cree Nation
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Uzma Ihsanullah

To the Indian Claims Commission
Kathleen N. Lickers

OTHER HOST BANDS

Fishing Lake First Nation
Gordon First Nation
Kinistin Saulteaux Nation
Muskoday First Nation
One Arrow First Nation
Sturgeon Lake First Nation
Yellowquill Band 90

NOVEMBER 2002

BACKGROUND

The James Smith Cree Nation brought forward its claim with regard to the Chakastaypasin Indian Reserve (IR) 98 Surrender to the Commission on May 10, 1999. It had been rejected on April 11, 1997, and then partially accepted on January 19, 1998. Canada accepted to negotiate on a "beyond lawful obligation" basis on the grounds that senior federal officials were involved in fraudulent activities in connection with the sale of 71 quarter sections of the reserve. This partial acceptance came with three conditions, two of which are relevant to the issue of the other Host Bands:

> 2 Agreement amongst the beneficiary First Nations as to their respective share, based on their review of the apportionment of the proceeds of sale of the reserve as of the date of the 1897 surrender.
>
> 3 That the Department of Justice (DOJ) be satisfied that all potential beneficiary First Nations have been identified.[1]

The January 19, 1998, letter also states that, "in the event that a final settlement is reached, Canada must obtain a formal release from each First Nation with an interest in this claim. This is to ensure that this portion of the claim cannot be reopened."[2]

Canada's letter of December 1998, which rejects the claim on the validity of the surrender, states that "the evidence does not establish an outstanding lawful obligation on Canada's part to the First Nations sharing an interest in the Chacastapasin claim with respect to the validity of the 1897 surrender,"[3] and reiterates the offer to negotiate with all interested First Nations with respect to the 71 quarter sections.

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[1] John Sinclair, Assistant Deputy Minister, Department of Indian Affairs and Northern Development (DIAND), to Chief Eddie Head, James Smith Cree Nation, January 19, 1998 (ICC file 2107-39-01, vol. 1).

[2] John Sinclair, Assistant Deputy Minister, DIAND, to Chief Eddie Head, James Smith Cree Nation, January 19, 1998 (ICC file 2107-39-01, vol. 1).

[3] Paul Cuillerier, Director General, Specific Claims Branch, DIAND, to Chief Eddie Head, December 29, 1998 (ICC file 2107-39-01, vol. 1).

The issue of the participation of the other Host Bands in the James Smith Cree Nation inquiry first arose before this Commission in the fall of 1999. In November 1999, the Commission was provided with a copy of a Protocol Agreement including seven of the eight Host Bands, which had been in place since June 9, 1998. This Agreement expressed that the other Host Bands supported Chakastaypasin in its reinstatement efforts, and that the James Smith Cree Nation would take the lead role in the claim, negotiation, and pending settlement of the Chakastaypasin IR 98 claim.

On April 19, 2001, Canada's counsel, Ms Uzma Ihsanullah, on behalf of Canada, wrote to each of the other Host Bands informing them of the activity on the James Smith Cree Nation – Chakastaypasin IR 98 claim. This letter expressed Canada's view that the other Host Bands should be added as *parties* to the James Smith Cree Nation – Chakastaypasin IR 98 Inquiry, although reserving Canada's right to make any arguments.

In response to Canada's April 19 letter, the Commission wrote to the other Host Bands on November 9, 2001, and June 5, 2002, to invite them to participate in the James Smith Cree Nation – Chakastaypasin IR 98 Inquiry to the extent of providing oral evidence in a community session(s) and reply submissions to Canada's and James Smith Cree Nation's written legal submissions.

During the seventh planning conference of the James Smith Cree Nation, the parties (Canada and James Smith Cree Nation) indicated their without-prejudice agreement to the limited participation of the other Host Bands outlined in the Commission's November 2001 and June 2002 correspondence. During a June 10, 2002, conference call, counsel for James Smith Cree Nation, Bill Selnes, expressed concern over the scope and manner of the participation outlined in the Commission's June 5, 2002, letter. Following this call, the Commission received a series of correspondence from James Smith Cree Nation – Chakastaypasin IR 98 which attempted to severely limit the other Host Bands' participation.

In response to this correspondence, the Commission wrote to the parties and the other Host Bands to indicate that the Commission would hear submissions on the manner of the other Host Bands' participation on August 22, 2002, with written submissions being due by August 1, 2002. During the Host Band planning conference on June 24, 2002, it became clear that the parties would also seek to argue the issue of the other Host Bands' participation, and that James Smith Cree Nation would challenge the Commission's mandate.

The Commission convened a hearing of the parties and the other Host Bands on August 22, 2002. After careful consideration of the issues, the Commission panel has rendered its decision. Each issue is addressed in turn below:

1 Does the Commission have the mandate to allow an Indian band to participate in the inquiry of another band when the band seeking participation does not have a rejected specific claim relating to the subject matter of the inquiry?

Yes. The Commission panel has heard and considered the objections and arguments of the James Smith Cree Nation, Canada, and the other Host Bands on this issue and has concluded that yes, the Indian Claims Commission, pursuant to its Order in Council and the *Inquiries Act*, has the power to exercise its discretion to hear any evidence and argument it deems requisite to the full investigation of the matters it is mandated to examine. In this regard, the Commission panel in this case is not limited to hearing the evidence and/or argument of only bands who have submitted a claim or only those bands who have a rejected claim.

2 If yes, does the Commission have the mandate to allow participation in the inquiry to an Indian band claiming an interest in a rejected specific claim of another band, which claim is subject of an inquiry by the Commission, without the consent of Canada and of the band whose claim has been rejected?

Yes. In the exercise of its discretion, pursuant to its Order in Council and the *Inquiries Act*, the Commission panel may seek out and hear whatever witnesses it deems would be beneficial to its understanding of the issues. As previously stated, the Commission's authority is not limited to hearing from only those bands with a rejected claim. In exercising this discretion, the Commission panel does not require the consent of either party to the inquiry.

Pursuant to its Order in Council, the Commission panel may adopt whatever method it deems expedient for the conduct of the inquiry. The flexibility of adopting its own procedures for inquiry means that the Commission has the power not only to adopt its own procedures, but it also has the power to control its own process. In so saying, it has the power to determine whom it will hear in the absence of the parties' consent.

3 If yes to 1 and 2, does the Commission have the mandate to allow a band seeking participation to have party status at the inquiry?

In the case of the Commission's inquiry into the James Smith Cree Nation – Chakastaypasin IR 98 surrender, the parties are the James Smith Cree Nation and Canada. The Commission, as previously stated, has the discretion to allow other groups to appear before it to introduce evidence and make argument. From the outset, Canada has insisted on the participation of the other Host Bands to the James Smith Cree Nation – Chakastaypasin IR 98 Inquiry. The Commission panel cannot now proceed with this inquiry as if it had not been made aware of the other Host Bands. The Commission has the power to adopt whatever methods it deems expedient for the conduct of an inquiry. In this case, the Commission panel has deemed it expedient to hear from the other Host Bands. In so saying, and with further refinement below as to the extent of that participation, the other Host Bands will be invited to participate but not as parties to this inquiry. There are only two parties to this inquiry – the James Smith Cree Nation and Canada.

4 The Commission welcomed argument on the manner of the participation of the other Host Bands into the IR 98 Inquiry.

The Commission panel has heard and considered the arguments of the James Smith Cree Nation, Canada, and the other Host Bands regarding the manner of the other Host Bands' participation, should it be allowed. The Commission panel has decided that it will hear any and all evidence the other Host Bands wish to put forward in the James Smith Cree Nation inquiry into IR 98 and the panel will welcome whatever arguments the other Host Bands wish to advance respecting this evidence. The Commission panel will not, however, permit the other Host Bands to expand or in any way alter the inquiry as raised by the James Smith Cree Nation.

The Commission panel welcomes whatever documentary and/or community evidence the other Host Bands may have ready to submit that will be beneficial to the panel's investigation in this case. The Commission panel is prepared to receive this evidence as soon as possible. Should the other Host Bands wish to put forward the evidence of elders in their respective communities, the panel directs that the other Host Bands coordinate the logistics of how to present this evidence with Commission counsel. Further, the panel is aware that elders' evidence must still be gathered at James Smith Cree Nation regarding the Chakastaypasin IR 98 claim. This session will therefore proceed first. The Commission panel will respect the wish of the James Smith Cree Nation to close this session to outside observers, should this request be made. A transcript of this session will be provided to all parties and the other Host Bands. The other Host Bands will not be participants at the gathering of the James Smith Cree Nation community session. Specifically, the other Host Bands will not be permitted to ask questions of the James Smith Cree Nation elders through Commission counsel.

Once provided with a transcript of the James Smith Cree Nation community session into Chakastaypasin IR 98, the other Host Bands will have six (6) weeks from receipt of the transcript to convene their respective community sessions, should that be necessary. At these sessions, the James Smith Cree Nation and Canada will have the right to participate as parties to the inquiry. In this way, both James Smith Cree Nation and Canada will have the right to ask questions of the elders of the other Host Bands; however, this right is limited, as is always the case, to posing questions through Commission counsel. There will be no right to cross-examine.

Should either the James Smith Cree Nation or the other Host Bands wish to introduce expert evidence that is not elders' evidence, then, as is always the case, such evidence must first be introduced in a written report; upon receipt of such a report, the Commission panel will determine whether or not it will be necessary to hear orally from the expert witness. All parties and the other Host Bands will have the right to cross-examine the expert witness.

In fairness to the James Smith Cree Nation, it will have the full and final opportunity to provide further evidence in response to either documentary or witness evidence that may be presented by the other Host Bands.

At the conclusion of the evidence gathering (documentary, oral history, or other expert evidence), the historical record will be closed and the inquiry will proceed to legal argument. The Commission directs that this stage of inquiry proceed as follows:

- The James Smith Cree Nation will first submit its written legal submissions;
- Canada will then submit its responding legal submissions;
- The other Host Bands will submit their reply submissions (if any) to the submissions of James Smith Cree Nation and Canada;

- Canada will submit a reply submission (if any) to the James Smith Cree Nation and the other Host Bands; and
- James Smith Cree Nation will submit a final reply (if any) to all.

The exchange of legal submissions will be followed by an oral session wherein the Commission panel will hear directly from the parties and the other Host Bands on their respective written legal submissions. Due to the amount of time necessary to allow all parties and the other Host Bands to be heard, the Commission panel will plan to convene the oral session over two days.

In conclusion, the Commission panel wishes to make clear that the decision to include the other Host Bands as participants in this inquiry does not in any way alter its fundamental purpose and scope – namely, to inquire into the rejection of the James Smith Cree Nation – Chakastaypasin IR 98 surrender claim as it was raised by the James Smith Cree Nation.

FOR THE INDIAN CLAIMS COMMISSION

Renée Dupuis   Roger Augustine

Renée Dupuis
Commissioner

Alan Holman
Commissioner

Roger J. Augustine
Commissioner

Dated this 1st day of November, 2002.

THE COMMISSIONERS

Chief Commissioner Phil Fontaine is an Ojibway from the Sagkeeng First Nation in Manitoba. He has worked for many years on behalf of First Nations and has also served as an elected leader in a number of senior positions in both the federal and First Nations governments. He served as National Chief of the Assembly of First Nations (AFN) for three years until July 2000 and previously was Grand Chief of the Assembly of Manitoba Chiefs. Before serving as Grand Chief, Mr Fontaine represented Manitoba at the AFN as Vice-Chief. His experience with the federal public service includes the positions of director general of the Yukon Region of the Department of Indian Affairs and Northern Development and deputy coordinator of the Native Economic Development Program. Mr Fontaine received a National Aboriginal Achievement Award in 1996 in recognition of his public service. He holds a bachelor of arts degree with a major in political studies from the University of Manitoba. Mr Fontaine was appointed Chief Commissioner of the Indian Claims Commission on August 29, 2001.

Roger J. Augustine is a Mi'kmaq born in Eel Ground, New Brunswick, where he served as Chief from 1980 to 1996. He was elected president of the Union of NB–PEI First Nations in 1988, and completed his term in January 1994. He received the prestigious Medal of Distinction from the Canadian Centre on Substance Abuse for 1993 and 1994 in recognition of his efforts in founding and fostering both the Eel Ground Drug and Alcohol Education Centre and the Native Alcohol and Drug Abuse Rehabilitation Centre. In June 1996, he was named Miramichi Achiever of the Year by the Miramichi Regional Development Corporation. Mr Augustine was appointed Commissioner of the Indian Claims Commission on July 27, 1992.

Daniel J. Bellegarde is an Assiniboine/Cree from the Little Black Bear First Nation in southern Saskatchewan. From 1981 to 1984, Mr Bellegarde worked with the Meadow Lake District Chiefs Joint Venture as a socio-economic planner. He was president of the Saskatchewan Indian Institute of Technologies from 1984 to 1987. In 1988, he was elected first Vice-Chief of the Federation of Saskatchewan Indian Nations, a position he held until 1997. He is currently president of Dan Bellegarde & Associates, a consulting firm specializing in strategic planning, management and leadership development, self-governance, and human resource development in general. Mr Bellegarde was appointed Commissioner, then Co-Chair of the Indian Claims Commission, on July 27, 1992, and April 19, 1994, respectively. He held the position of Co-Chair until the appointment of Phil Fontaine as Chief Commissioner.

Jane Dickson-Gilmore, born in Alberta and raised in British Columbia, is an associate professor of law at Carleton University, where she teaches such subjects as aboriginal community and restorative justice, as well as conflict resolution. Active in First Nations communities, she serves as an advisor for the Oujé-Bougoumou Cree First Nation Community Justice Project and makes presentations to schools on aboriginal culture, history, and politics. She also provides expert advice to the Smithsonian Institution – National Museum of the American Indian. Ms Dickson-Gilmore has been called upon to present before the Standing Committee of Justice and Human Rights, as well as to act as an expert witness in proceedings before the Federal Court and Canadian Human Rights Commission. A published author and winner of numerous academic awards, Ms Dickson-Gilmore is a graduate of the London School of Economics with a PhD in law and holds a BA and MA in criminology from Simon Fraser University. Ms Dickson-Gilmore was appointed a Commissioner of the Indian Claims Commission on October 31, 2002.

Renée Dupuis has had a private law practice in Quebec City since 1973. From the outset, she focussed largely on human rights and specifically on the rights of Canada's aboriginal peoples. From 1972 to 1975, she served as lawyer for the Association of Indians of Quebec and beginning in 1978, acted as legal advisor to the three Attikamek and nine Montagnais bands in her home province, representing the bands in their land claims negotiations with the federal, Quebec, and Newfoundland governments, as well as in the constitutional negotiations. From 1989 to 1995, Mme Dupuis served two terms as Commissioner of the Canadian Human Rights Commission. She has served as consultant to various federal and provincial government agencies, authored numerous books and articles, and lectured extensively on human rights, administrative law, and aboriginal rights. Mme Dupuis is a graduate in law from the Université Laval and holds a master's degree in public administration from the École nationale d'administration publique. She was appointed Commissioner of the Indian Claims Commission on March 28, 2001.

Alan C. Holman is a writer and broadcaster who grew up on Prince Edward Island. In his long journalistic career, he has been an instructor at Holland College in Charlottetown, PEI; editor-publisher of a weekly newspaper in rural PEI; a radio reporter with CBC in Inuvik, NWT; and a reporter for the Charlottetown *Guardian*, *Windsor Star*, and *Ottawa Citizen*. From 1980 to 1986, he was Atlantic parliamentary correspondent for CBC-TV news in Ottawa. In 1987, he was appointed parliamentary bureau chief for CBC radio news, a position he held until 1994. That same year, he left national news reporting to become principal secretary to then-PEI Premier Catherine Callbeck. He left the premier's office in 1995 to head public sector development for the PEI Department of Development. Since the fall of 2000, Mr Holman has worked as a freelance writer and broadcaster. He was educated at King's College School in Windsor, NS, and Prince of Wales College in Charlottetown, where he makes his home. He was appointed Commissioner of the Indian Claims Commission on March 28, 2001.

Sheila G. Purdy has been an advisor to the government of the Northwest Territories on justice and other matters relating to territorial division and the creation of Nunavut. From 1993 to 1996, she was senior policy advisor to the Minister of Justice and the Attorney General of Canada on a number of justice issues, including aboriginal justice, the *Canadian Human Rights Act*, and violence against women. From 1991 to 1993, she acted as policy analyst on the constitution, justice, aboriginal affairs, women, human rights, and also for the Solicitor General. In 1992 and 1993, she was a special advisor on aboriginal affairs to the Office of the Leader of the Opposition and from 1989 to 1991, she was legal consultant on environmental issues. She has been active in advocating against abuse of the elderly, and in 1988, she received the Award of Merit from Concerned Friends for her work in this area. She worked as a lawyer in private practice from 1982 to 1985 after graduating with a law degree from the University of Ottawa in 1980. She was appointed Commissioner of the Indian Claims Commission on May 4, 1999.